Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 06-189
Competition in the Market for the	)	
Delivery of Video Programming	)	

JOINT REPLY COMMENTS

CBS Corporation, Fox Entertainment Group, Inc. and Fox Television Stations, Inc., NBC Universal, Inc. and NBC Telemundo License Co., and The Walt Disney Company (collectively the "Broadcast Networks") hereby submit their reply to the comments filed in response to the Federal Communications Commission's *Notice of Inquiry*, released October 20, 2006, regarding the annual assessment of the status of competition in the market for the delivery of video programming.[1] Specifically, and contrary to the assertion of the Coalition for Retransmission Consent Reform,[2] the Broadcast Networks submit that the current retransmission consent ("RTC") process established by Congress is working as intended to provide benefits to consumers, broadcasters and multichannel video program distributors ("MVPDs") alike. In fact, the RTC process has strengthened local broadcasting and helped to ensure a competitive video marketplace. The Coalition's comments are but another salvo in the continuing efforts of certain MVPDs to obtain valuable broadcast content without payment, contrary to the intent of Congress.

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1 *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 21 FCC Rcd 12229 (2006) ("*Notice of Inquiry*").

2 *See Comments of the Coalition for Retransmission Consent Reform* (filed November 29, 2006) (the "Coalition"). Similar comments also were filed by other parties, including the National Telecommunications Cooperative Association and Broadband Service Providers.

The Broadcast Networks have submitted ample evidence over the past three years to demonstrate conclusively that the current RTC process serves the public interest. Copies of the Broadcast Networks' prior submissions regarding RTC, which were filed in the Commission's 2003 video competition proceeding and as part of the 2005 Satellite Home Viewer Extension and Reauthorization Act inquiry, are attached hereto as Exhibit A and incorporated by reference. Contrary to the suggestion of the Coalition, RTC is as necessary today to the preservation of free over-the-air broadcast television as it was in 1992 when adopted by Congress. The networks' submissions confirm that the RTC system has worked well to promote a vigorously competitive video programming market. The current system effectively requires local stations and MVPDs to negotiate face-to-face to ensure that MVPDs can provide their subscribers with all of the highly-sought, high-quality programming produced by broadcasters, while at the same time affording broadcasters some reasonable measure of compensation in return.

Just last year, at the direction of Congress, the FCC conducted an extensive review of the RTC system and its impact on video competition.[3] The Commission found that the system was functioning properly and that it was not necessary to recommend specific statutory amendments.[4] The Commission reached a similar conclusion in 2004, when it found that "the current retransmission consent process is a function of the statutory framework adopted by Congress and we cannot conclude that it is not working as intended."[5]

This system has dramatically expanded the video programming choices for millions of Americans, and no reliable evidence has been presented that would warrant any modifications.

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[3] *See Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Report, 2005 FCC LEXIS 4976 (2005).

[4] *Id*. at ¶¶ 2, 44-45.

[5] *Report on the Packaging and Sale of Video Programming Services to the Public*, Letter, 2004 FCC LEXIS 6518 (2004).

The Coalition submits a previously-filed study by William Rogerson for the proposition that broadcasters have used the RTC process to launch new programming networks and obtain higher license fees for these networks.[6] However, as was made clear by Michael Baumann and Kent Mikkelsen of Economists Incorporated in their response to Mr. Rogerson (a copy of which is attached hereto at Exhibit B), obtaining carriage of non-broadcast MVPD programming in return for RTC does not harm competition in the MVPD programming market.[7] The legislative history of the 1992 Cable Act and Commission precedent also confirm that unfettered negotiation (including the ability to bargain for non-cash consideration) is necessary to ensure a competitive balance in the video marketplace.[8] The Broadcast Networks simply do not have the type or degree of market power that leads to harm to competition or consumers.[9] Furthermore, the Coalition's suggestion that broadcasters are "insulated from the workings of the marketplace" because they are guaranteed placement on the most widely-viewed tier evidences a misunderstanding of the RTC process.[10] Once a broadcaster elects RTC, it must bargain for placement and compensation just like every other provider of MVPD programming.

The market is working as intended by Congress, and the Commission should disregard the Coalition's pleas for government intervention. The Commission should instead reaffirm in

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6 *See Coalition Comments*, at 2-3.

7 *See* Michael G. Baumann and Kent W. Mikkelsen, "Response to Comments Regarding Economic Consequences of Retransmission Consent," at 1-2, attached as Exhibit B and hereby incorporated by reference ("Baumann and Mikkelsen Report").

8 *See, e.g., Reply Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc.; National Broadcasting Company, Inc. and Telemundo Communications Group, Inc.; Viacom; and The Walt Disney Company and the ABC Television Network*, MB Docket No. 03-172, at 4-9 (filed September 26, 2003), attached as Exhibit A, Tab F; *Reply Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc.*, MB Docket No. 05-28, at 4-5 (filed March 31, 2005) (noting that, historically, many cable operators refused to pay cash for carriage of local television signals), attached as Exhibit A, Tab C.

9 Baumann and Mikkelsen Report, at 1-2.

10 *See Coalition Comments*, at 3.

its report to Congress that over-the-air broadcasters must continue to rely upon RTC to ensure fair and reasonable terms of carriage.

Respectfully submitted,

CBS CORPORATION

FOX ENTERTAINMENT GROUP, INC. AND FOX TELEVISION STATIONS, INC.

NBC UNIVERSAL, INC. AND NBC TELEMUNDO LICENSE CO.

THE WALT DISNEY COMPANY

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Dated: December 29, 2006

EXHIBIT A

RETRANSMISSION CONSENT SUBMISSIONS

Tab

In re Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace, MB Docket No. 05-28

A Comments of NBC Universal, Inc. (filed March 1, 2005)

B Comments of The Walt Disney Company (filed March 1, 2005)

C Reply Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. (filed March 31, 2005)

D Joint Reply Comment of NBC Universal, Inc. and NBC Telemundo License Co. (filed March 31, 2005)

E Reply Comments of The Walt Disney Company (filed March 31, 2005)

In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 03-172

F Reply Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc.; National Broadcasting Company, Inc. and Telemundo Communications Group, Inc.; Viacom;[*] and The Walt Disney Company and the ABC Television Network (filed September 26, 2003)

G Letter from John C. Quale on behalf of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., National Broadcasting Company, Inc. and Telemundo Communications Group, Inc., and Viacom,[*] to Marlene Dortch, Secretary, Federal Communications Commission (filed December 23, 2003)

H Letter from Susan L. Fox on behalf of The Walt Disney Company to Marlene Dortch, Secretary, Federal Communications Commission (filed December 23, 2003)

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[*] Viacom was formerly the parent of CBS Corporation, which operates the CBS Television Network and the CBS Television Stations Group. On December 31, 2005, Viacom split into two separate, publicly traded corporations, CBS Corporation and Viacom Inc.

Tab A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:	)	
	)	
Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act On Rules Affecting Competition in the Television Marketplace	))))	MB Docket No. 05-28

To: The Media Bureau

COMMENTS OF NBC UNIVERSAL, INC.

A free, over the air television station's most essential product is its programming. As any other business sells its products, a local station sells its programming — to viewers, to advertisers and, in some cases, to other distribution systems. A local station, like any other business, has the right to sell its property for what the free market will bear. The success of such negotiations in part determines what news and other programming the station can afford to develop in the future.

Congress has asked the Commission to report as to the effect on competition between satellite and rural cable operators of several Commission policies – including retransmission consent and syndicated exclusivity. These policies have a common root: they advance free-market competition by protecting the right of local broadcast stations and other distribution systems to resolve, through free, private negotiations, the value of a station's programming, which other distribution systems then re-sell to their customers. Because elimination of these policies would degrade private property rights, and the highly competitive programming marketplace presents no extraordinary justification for government intervention, these policies should be broadly upheld.

Retransmission Consent Ensures that Private Parties, Not the Government, Can Determine the Value of a Station's Programming

Retransmission consent is not some special Commission policy designed to protect free television against pay-distribution systems; retransmission consent is nothing more than Communications Act jargon for the free market. Retransmission consent is the right of a local station to negotiate a fair return in exchange for granting a license to a multichannel video programming distributor ("MVPD") like a cable or DBS operator to include that station in the programming packages that it then sells to consumers. Retransmission consent does not give a broadcaster an unfair advantage in the marketplace; to the contrary, as every station wants to maximize its viewership, stations have every reason to seek redistribution (and, under federal statute and the Commission's Rules, have a good-faith obligation to conduct retransmission negotiations). [1] That a station, as a property owner, retains the right to negotiate a free-market deal for its programming simply ensures that local stations do not have to give away their most valuable private asset – their programming – to their MVPD competitors (who then can use that programming to attract customers away from the station and the station's advertisers.)

Similarly, the specific terms for a station's programming that are developed between a programming redistributor and a specific broadcaster are a matter of private negotiation, not government regulation. As the relevant Senate committee noted in the legislative history underlying the 1992 Cable Act: [2]

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1 *See* 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. 76.65(a) (requiring television stations to negotiate in good faith with other redistribution systems).

2 *See* Cable Television Consumer Protection and Competition Act of 1992, Senate Report at 36 (as cited by *In the Matter of Implementation of the Satellite Home Viewer*

> It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.

As a practical matter, such negotiations help to ensure that the relevant parties understand the scope of the rights at issue: for example, many stations cannot agree to MVPD retransmission of certain programming outside of the station's designated market area. A local station, like a manufacturer or swimming pool operator, has the right to sell its product, either as a retailer to consumers or a wholesaler to other businesses – whether that product is award-winning local news programming or equipment or taking a swim in a private pool. Conversely, as the free market requires that a cable or a DBS operator must acquire the equipment or power or workers it needs to operate, so the free market compels cable and DBS operators alike to negotiate for the station's consent for the operators to retransmit a particular local station's programming.

Congress and the Commission long ago settled that respect for private property rights should not evaporate simply because a local station chooses to broadcast a program to consumers. [3] The free market understands that a broadcaster, like other private businesses, may choose to retail a product under one set of terms to consumer endusers and to wholesale the same product on another set of terms to those who wish to resell that product. That a local station chooses to deliver its products to some for

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Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, First Report and Order, 15 FCC Rcd 5445 (2000)).

[3] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 325(b) (conditioning right of cable system to retransmit local programming on retransmission consent or a mandatory carriage election); *Implementation of the Cable Television of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 (1993), *clarified*, 8 FCC Rcd 4142 (1993).

free accordingly does not bar it from charging those who want to take its product and sell it to other consumers.

As to the specific issue at hand, the current free-market policy cannot be said to skew MVPD competition because retransmission consent requires all multichannel video programming distributors that want to retransmit a local station's programming to get that station's consent. That these negotiations do not necessarily result in the same terms for different redistributors is further proof that the free market is the best way to determine the appropriate value of the programming for each redistributor. Likewise, that in many cases such free-market negotiations result in nothing more for a station than better channel placement on a cable system's lineup does not render trivial the free market principles underlying the policy.

As retransmission consent is nothing more than the free market, those who want the government to intervene in currently private negotiations must prove that extraordinary circumstances justify that intervention. In today's world of a hundred-plus channels on cable or DBS systems, no station's programming is so dominant as to demonstrate market power, and broadcast stations, as a group, have no overriding means or motive to discriminate against the multichannel distributors that help to increase viewership of their stations. [4] Without extensive proof justifying government intervention in the free market, the Commission and Congress should continue to support the current system that permits a local station to enter into private negotiations with MVPDs that want to retransmit the station's programming.

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[4] *See* Report on the Packaging and Sale of Video Programming Services to the Public at 80 (submitted by Federal Communications Commission to House Committee on Energy and Commerce on November 18, 2004) (holding that traditional antitrust claims are sufficient to maintain competitiveness of programming redistribution market).

Syndicated Exclusivity Similarly Protects the Free Market and Consumers

The Commission's syndicated exclusivity policies have two key elements: i) to protect the right of private parties to negotiate critical terms like exclusivity (and to enforce that right against certain third parties that may redistribute such programming); and ii) to define the maximum extent of any grant of exclusivity to a specific geographic area.

The first policy is, again, just the free market -- it allows a station and a syndicated programming provider to negotiate the scope of any exclusive arrangement as one of many issues during a station's private negotiations to acquire the right to broadcast and otherwise distribute a program. In these negotiations, the syndicator has two critical goals: to maximize the return on the programming in this particular deal and to maximize the number of other potential customers for the programming. [5] A station wants to ensure that the program it is buying will attract viewers and advertisers. Accordingly, a station wants to protect its investment by ensuring that no other competing stations also have the right to air the same program while a syndicator wants, all things being equal, to limit the station's zone in which it can claim exclusivity so the syndicator can sell the programming to more stations. The syndicator also wants to limit the cable or other redistribution systems that have the right to retransmit its programming outside of the station's immediate service area. In most cases, these competing goals result in privately-negotiated terms that serve the parties and

5 *See In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299 (¶ 71) (1988) ("*Syndicated Exclusivity Order*").

consumers. As the Commission noted in reinstating syndicated exclusivity rights for broadcasters more than 15 years ago: [6]

> The important point about competition with clearly defined property rights is that arrangements will differ with circumstances, but the arrangement that is reached in any particular circumstance is likely to be the one that best meets the demands of viewers.

In these instances, the Commission's policy just enables syndicators and broadcasters to know that their agreed-upon exclusivity rights can be enforced against parties necessarily external to the syndicator's and station's negotiations, including other distribution systems like cable and DBS operators and distant signals. It also ensures that broadcasters have the right, as other distributors, to negotiate areas in which programming will be exclusively available through a station.

The second policy limits such free-market negotiations, but only in the odd and troubling circumstance in which a station demands an exclusive right to a program within an unusually broad geographic area. By affirmatively limiting any "exclusive" geographic area, this policy seeks to protect consumers, multichannel video programming distributors (including rural cable operators and DBS providers) and smaller local stations against distant signals seeking unusually broad exclusivity zones. [7] Otherwise, in an unfettered free market, a station -- especially a more powerful station - could decide to pay more for a program in exchange for exclusivity far beyond the station's typical service area. In that case, cable systems or DBS operators

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6 *Id.* (¶ 89).

7 *See Request for Ruling by Press Television Corporation Concerning Applicability of Section 73.658(m) of the Commission's Rules in the Orlando-Daytona Beach-Melbourne-Cocoa Television Market*, Memorandum Opinion & Order, 4 FCC Rcd 8799 (1989) (explaining that initial exclusivity rules were designed to protect the public and other distributors against "excessive contractual exclusivity").

outside that station's DMA that wanted to carry the program would have to incur the additional copyright and other burdens of carrying a distant signal to their subscribers to access the program, as well as adding to the number of free, over the air stations a MVPD has to carry. [8]

By limiting exclusivity to a specific and fixed geographic zone, the Commission ensures that more local stations have the chance to acquire programming. That in turn means that far fewer cable systems will have to face the copyright burdens compelled by the transmission of distant signals just to get a particular program and far more consumers can expect to have over-the-air or basic-tier access to a popular syndicated program, as well as establishing clear baselines for all of the many actors involved in syndicated programming relationships.

Decades of precedent have demonstrated that the Commission's chosen geographic zone strikes a reasonable balance among the competing interests of syndicators, stations, redistributors, and consumers, especially those that are not able to participate in the negotiations establishing certain exclusivity rights. [9] Accordingly, without overwhelmingly compelling evidence that this long-established policy no longer

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[8] *See, e.g.*, *Syndicated Exclusivity Order*, 3 FCC Rcd 5299 (n. 187).

[9] *See, e.g.*, *Request for Ruling by Press Television Corporation Concerning Applicability of Section 73.658(m) of the Commission's Rules in the Orlando-Daytona Beach-Melbourne-Cocoa Television Market*, Memorandum Opinion & Order, 4 FCC Rcd 8799 (1989) (clarifying rule in particular case to enable outlying station to compete against other larger stations); *Amendment of Part 73 of the Commission's Rules with Respect to the Availability of Television Programs Produced by Non-Network Suppliers to Commercial Television Stations and CATV Systems*, 59 FCC 2d 1058 (1976) (implying that policy intends to protect smaller Sarasota stations and their consumers from nearby Tampa stations, which otherwise would preclude Sarasota stations from access to much programming).

serves the public interest, the Commission should uphold its existing syndicated exclusivity policy.

CONCLUSION

For the foregoing reasons, any report to Congress relating to retransmission consent and syndicated exclusivity should uphold existing Commission policies and the free-market and pro-consumer principles that underlie such policies.

Respectfully submitted,

NBC UNIVERSAL, INC.

By: F. William LeBeau

F. William LeBeau

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Dated: March 1, 2005

Tab B

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Required by the Satellite Home Viewer	)	
Extension and Reauthorization Act on Rules	)	MB Docket No. 05-28
Affecting Competition in the Television	)	
Marketplace	)	
	)	

COMMENTS OF THE WALT DISNEY COMPANY

These comments are submitted on behalf of The Walt Disney Company ("TWDC"), ESPN (80% owned by TWDC), Disney ABC Cable Networks Group (including The Disney Channel, ABC Family, Toon Disney and SOAPnet), The ABC Television Network and the ABC-owned television stations (hereinafter collectively referred to as "Disney"). Disney is filing these brief Comments in response to the Commission's recent request for comment on the retransmission consent and other rules that are the subject of a study that the FCC is required to complete under Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA). Disney's retransmission consent practices are reasonable and flexible and Disney strongly believes that there is no reason to revise the retransmission consent statutes or regulations.

As part of the FCC's A La Carte proceeding, Disney stressed that it offers carriage of its ten ABC-owned broadcast stations at a standalone price.[1] To establish that the standalone price itself is reasonable, Disney submitted an economic study that determined the fair market value of three of the ABC owned television stations (one station in a large market and the two stations in the smallest markets in which ABC owns television stations).[2] ABC's Retransmission Consent Economic Analysis concluded that the value – on average – of the ABC owned stations ranged between $2.00 and $2.09 per subscriber per month, well in excess of ABC's cash standalone offer. A copy of the Retransmission Consent Economic Analysis is attached to these comments.

Notably, the Retransmission Consent Economic Analysis used <u>three</u> different approaches to assess the value of the ABC Owned stations, <u>all</u> of which resulted in a figure in excess of Disney's cash offer and <u>all</u> of which, according to the Analysis, likely understate the actual value. The first method was to determine the value of the stations based on the retail price for the stations as sold by DBS (with results ranging from $.97 to $1.23). The second method was to determine the value of the stations based on the retail price for the stations as sold by cable (with results ranging from $1.90 to $3.06). The third method was based on the amount spent by The ABC Television Network for programming (and discounting for the lack of advertising availabilities on broadcast networks) and determining a license fee comparable to a cable network. The third method notably included <u>only</u> the amounts spent by the ABC Television Network, and not the <u>vast</u> amounts spent by the local stations themselves (for news, public affairs, syndicated programming), and that result was $2.27.

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[1] *See* Pyne Declaration, attached to Disney's A La Carte Comments as Attachment 11.

[2] *See* Michael G. Baumann and Kent W. Mikkelsen, THE FAIR MARKET VALUE OF LOCAL CABLE RETRANSMISSION RIGHTS FOR SELECTED ABC OWNED STATIONS (July 15, 2004).

To the extent that there are any questions regarding Disney's retransmission consent practices, Disney also addressed those issues in the FCC's A La Carte proceeding, and asks that the Commission incorporate those comments into this proceeding. In that proceeding, Disney stressed that, when negotiating with MVPD's – including smaller rural carriers – Disney offers flexibility in striking a retransmission consent deal. Specifically, Disney stressed that it does not require MVPDs to carry certain of its programming services as a prerequisite to carrying Disney's most popular programming services (namely, the signal of the ABC-owned television stations or ESPN). Therefore, Disney reiterates that its retransmission consent practices do not provide the FCC with any basis to recommend any changes to the retransmission consent process.

Respectfully submitted,

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March 1, 2005

Tab C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of		
	)	
Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace	)))))	MB Docket No. 05-28

REPLY COMMENTS OF

FOX ENTERTAINMENT GROUP, INC. AND FOX TELEVISION HOLDINGS, INC.

March 31, 2005

SUMMARY

In response to the Media Bureau's call for public comment regarding certain rules and policies affecting competition in the multichannel video programming distribution ("MVPD") market, a number of commenters (the NAB and the television network affiliates associations) provided accurate information that should be helpful as the Commission formulates the report to Congress required by the Satellite Home Viewer Extension and Reauthorization Act. Several parties, however, including the Joint Cable Commenters and EchoStar Satellite, LLC, have used the Bureau's call for comments as an opportunity to renew their attacks on the retransmission consent ("RTC") process.

Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. (together, "Fox") hereby respond to claims that RTC is in need of repair. As these reply comments demonstrate, the Cable Commenters' and EchoStar's criticisms of broadcasters and the RTC process are based primarily on self-serving speculation, misstatements and highly qualified conclusions – none of which should find its way into the Commission's report to Congress. The reality is that RTC continues to benefit free, over-the-air television and consumers – just as Congress envisioned more than a decade ago. The Cable Commenters' and EchoStar's goal is to be able to return to the days before the enactment of retransmission consent, when MVPDs could provide their subscribers with valuable, high quality broadcast programming without the consent of or compensation to local stations. Thus, they hope to persuade the Commission to recommend to Congress that broadcasters should be barred from seeking either cash payments *or* carriage of additional channels in exchange for RTC. This result is warranted neither by the submissions in this proceeding nor by the 12 years of experience with RTC.

The bulk of the Cable Commenters' argument relies on the dubious claim that the

major broadcast networks, including Fox, have used RTC not to benefit their broadcast businesses, but to become the "dominant" providers of MVPD programming. It is true that networks and other broadcasters have negotiated for carriage of affiliated programming networks in exchange for RTC, but that is primarily because of the cable industry's seminal decision not to pay cash at the outset of the first round of RTC negotiations. And while Fox and other broadcasters have pursued a pro-competitive strategy to make great inroads into the MVPD programming market, by no means is it fair to say that broadcasters dominate the market or that they have neglected their broadcasting businesses in the process.

Purporting to measure "ownership" in the MVPD programming market based on industry revenues, the Cable Commenters claim that broadcasters somehow dominate "ownership" of MVPD networks. If broadcasters' revenues are disproportionately large relative to the number of MVPD channels that they own, however, it is only because they have succeeded in developing extremely popular channels that garner a disproportionately large share of the viewing audience. Thus, even under their bogus definition of "ownership," the Cable Commenters have wholly failed to demonstrate that RTC has led to broadcaster domination of non-broadcast channels. In fact, as the Commission itself recognized, broadcasters own only about a quarter of all nationally distributed MVPD programming networks, about the same number owned by cable operators.

The Cable Commenters also accuse broadcasters of using RTC to expand into MVPD programming at the expense of over-the-air television. They offer only newspaper accounts and anecdotes – not empirical data or analyses – to support this erroneous claim. Yet even the Cable Commenters' own pleading relies on quotes from Fox executives who emphasized that Fox's expansion into MVPD programming was part of a concerted plan to meet competitive challenges "*to the benefit of our core broadcasting business*." In fact, Fox consistently has used its MVPD channels to strengthen broadcast television by, for example, offering content that complements Fox's broadcast identity and encourages viewers to continue to watch the entire family of Fox channels – including the FOX Network and local broadcast stations.

The Cable Commenters also charge that RTC has resulted in cable rate increases. But their pleading relies on questionable data and fails to demonstrate that RTC has had any impact whatsoever on cable rates. The Cable Commenters and their economic expert did not conduct a multivariate regression analysis, controlling for relevant variables, in order to determine whether other factors may be responsible for license fee increases. In fact, there may be a variety of explanations as to why license fees may have increased more rapidly for broadcaster-affiliated MVPD networks than other MVPD networks – including in particular the disproportionate popularity of broadcaster-affiliated MVPD channels. The Commission should not rely upon this type of unsubstantiated data in reporting to Congress.

Finally, neither the Cable Commenters nor EchoStar are able to support their claims that broadcasters' use of RTC constitutes illegal tying. As EchoStar correctly acknowledges, tying arrangements are illegal *only* when a seller offers two separate products with the sale of one being conditioned on the purchase of the other. Fox, like virtually all broadcasters, remains fully willing to negotiate RTC in good faith, and to offer MVPDs multiple options for consideration in exchange for allowing operators to carry the extremely valuable programming offered by Fox's broadcast stations. Thus, a fundamental prerequisite for illegal tying is absent, and the Cable Commenters' and EchoStar's allegation is without merit.

In short, the RTC process has worked well for more than a decade to provide broadcasters, MVPDs and consumers a broad array of benefits. Confronted with the cable industry's refusal to pay cash for RTC over a decade ago, broadcasters used RTC to create competitive MVPD channels that are enjoyed by millions of consumers each day, challenging MVPDs for eyeballs and advertising revenues – and they have succeeded. Despite these obvious benefits to competition and diversity, a few cable operators and EchoStar have asked the Commission to tell Congress that the RTC process is somehow flawed. The Commission should reject their invitation and should instead reaffirm that RTC has produced a wealth of benefits for both free, over-the-air television and American consumers.

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Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace	))))	MB Docket No. 05-28
	)	

REPLY COMMENTS OF
FOX ENTERTAINMENT GROUP, INC. AND FOX TELEVISION HOLDINGS, INC.

Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. (together, "Fox") hereby submit their reply to comments filed in response to the Media Bureau's *Public Notice*,[1] released January 25, 2005, regarding certain rules and policies affecting competition in the multichannel video programming distribution ("MVPD") market. Fox owns and operates both broadcast and MVPD networks as well as 35 television stations throughout the United States. The Bureau issued the *Public Notice* to assist the Commission in meeting its obligation to submit a report to Congress by September 8, 2005, as required by Section 208 of the Satellite Home Viewer Extension and Reauthorization Act.

A number of commenters, including the National Association of Broadcasters and the ABC, CBS, FBC and NBC Television Affiliate Associations, have provided accurate and helpful information on the workings of the MVPD market. These comments detail not only how well the retransmission consent ("RTC") process has worked to further competition in

[1] *See Media Bureau Seeks Comment for Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace*, Public Notice, DA 05-169 (released January 25, 2005) (the "*Public Notice*").

the MVPD programming market, but also how vital RTC remains to the future of the over-the-air television system in the United States.[2]

In contrast, certain commenters have used the Bureau's call for comments as an opportunity to renew their attacks on the RTC process.[3] As Fox will demonstrate, the comments of those attacking RTC consist of unsupported self-serving speculation, misstatements and highly qualified conclusions. The contents of these comments, therefore, should not serve as a basis for the report to Congress. While the Cable Commenters stress in their pleading that broadcast stations provide "must-have" programming,[4] they complain about furnishing any consideration for that programming and would bar broadcasters from accepting either cash payments *or* carriage of additional channels in exchange for retransmission consent. As Congress recognized more than 10 years ago, however, broadcasters should not be forced to allow MVPDs to build their businesses on the back of valuable, high-quality broadcast programming for free, and instead should continue to have the right to negotiate for fair compensation.

The Cable Commenters and EchoStar also assert that the RTC process has led to "unlawful" bundling or tying, but the facts belie this assertion.[5] As EchoStar's comments

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2 *See* Comments of the National Association of Broadcasters in MB Docket No. 05-28 (filed March 1, 2005) ("NAB Comments"), at 13-17; Comments of the ABC, CBS, FBC and NBC Television Affiliate Associations in MB Docket No. 05-28 (filed March 1, 2005), at 6-7.

3 *See* Comments of Joint Cable Commenters (Advance/Newhouse Communications, Cox Communications, Inc. and Insight Communications) in MB Docket No. 05-28 (filed March 1, 2005) (the "Cable Commenters"); Comments of EchoStar Satellite, L.L.C. in MB Docket No. 05-28 (filed March 1, 2005).

4 *See, e.g.*, Comments of Cable Commenters, at 13.

5 *See id.* at 11; Comments of EchoStar at 4.

acknowledge, tying is unlawful *only if* the seller is offering two separate products with the sale of one being conditioned on the purchase of the other.[6] Given that Fox and virtually all other broadcasters are willing to discuss a cash alternative to program carriage as consideration for RTC, the element of "conditioning" is absent from retransmission consent negotiations. In short, the allegations of improper tying are without merit.

Neither the Cable Commenters nor EchoStar have presented the Commission with any evidence that would warrant overturning a system that has benefited MVPDs, broadcasters and consumers alike. Accordingly, the Commission should report to Congress that no statutory changes are needed with respect to RTC.[7]

I. BROADCASTERS HAVE ACHIEVED GREAT SUCCESS IN THE MVPD PROGRAMMING MARKET THROUGH SUPERIOR CONTENT WHILE UTILIZING RTC TO BENEFIT OVER-THE-AIR BROADCASTING

The Cable Commenters' attack on the RTC process is unsupported by any rigorous economic analysis. Even the study submitted by the Cable Commenters' economic expert, William Rogerson,[8] relies overwhelmingly (much like their comments) on newspaper accounts and other anecdotal evidence, and is bereft of properly supported conclusions. Fox submits that there is little doubt not only that broadcasters have utilized RTC precisely as

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6 *See id.*

7 The American Cable Association ("ACA") also filed comments in this proceeding renewing its years-long attack on the RTC process. Nothing contained in ACA's comments, however, alters the conclusion that the Commission should recommend to Congress that no changes are needed with respect to RTC. *See* Comments of the American Cable Association in MB Docket No. 05-28 (filed March 1, 2005).

8 *See The Social Cost of Retransmission Consent Negotiations*, William P. Rogerson, February 28, 2005 (submitted with the Comments of the Cable Commenters) (the "Rogerson Statement").

envisioned by Congress – with no anti-competitive effect – but also that RTC has provided consumers with important benefits.

A. Historical Background

A number of commenters in this proceeding have provided the Commission with a succinct history of the cable industry's response to RTC in the early 1990s.[9] Congress enacted the retransmission consent provision of the 1992 Cable Act to ensure the continued viability of over-the-air television and to protect the public interest benefits of broadcast television.[10] The cable industry, which prior to 1992 carried local broadcast stations without the consent of or compensation to station owners, "took a hard line from the start, pledging they would pay no cash for carriage."[11] Congress wisely accounted for this possibility, however, and recognized that, in the exercise of their retransmission consent rights, broadcasters may seek alternative forms of compensation.[12] "[Some] broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system."[13]

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9 *See, e.g.*, NAB Comments, at 13-14.

10 *See* S. Rep. No. 102-92 (1991) ("The Committee has concluded that the exception to section 325 for cable retransmissions has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting.").

11 *1993: The Year in Review*, Electronic Media, December 20, 1993.

12 *See* S. Rep. No. 102-92.

13 *Id.* The Cable Commenters criticize broadcasters for negotiating RTC "on a national basis at the corporate level." *See* Comments of Cable Commenters, at 31. Many MVPDs, however, prefer the efficiency of negotiating RTC for all their systems, and for all of the stations owned and operated by a single licensee, at one time. In any event, nothing compels an MVPD to choose the same form of consideration in every market – an operator is free to negotiate for a cash payment rather than carry an

The Commission's rules regarding retransmission consent are fully consistent with the congressional mandate. The Commission expressly permits offering retransmission consent on a barter basis (*e.g.*, carriage of associated cable network or other broadcast stations). As the FCC has explained: "We do not find anything to suggest that, for example, requesting an MVPD to carry an affiliated channel, another broadcast signal in the same or another market, or digital broadcast signals is impermissible or other than a competitive marketplace consideration . . . [and] we point out that these are bargaining proposals which an MVPD is free to accept, reject or counter with a proposal of its own."[14]

It is somewhat ironic, then, that the Cable Commenters provide an historical account of the development of RTC that fails to touch on the cable industry's seminal decision not to pay cash at the outset of the first set of negotiations with broadcasters. The Cable Commenters attempt to retell the story of how Fox and other broadcasters utilized the RTC process to bargain for the launch of affiliated cable channels, such as FX.[15] But the story leaves out the all-important context of the cable industry's refusal to consider cash as a viable form of consideration, leaving broadcasters with no other choice but to develop other ways to realize the value of their stations' signals.

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affiliated program network on a particular system. *See In Re Annual Assessment of the Status of Competition in the market for the Delivery of Video Programming*, MB Docket No. 03-172, Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., National Broadcasting Company, Inc. and Telemundo Communications Group, Inc., Viacom, and The Walt Disney Company and The ABC Television Network (filed September 26, 2003) (the "Video Competition Comments"), at 8-9.

14 *In Re Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 56 (2000).

15 *See* Comments of Cable Commenters, at 9-12.

B. The Broadcast Industry Does Not Unfairly "Dominate" the MVPD Programming Market

Devoting 20 pages of their comments to the claim, the Cable Commenters argue that the major broadcast networks have used RTC to become dominant providers of MVPD programming. They suggest that broadcasters have "transformed themselves from marginal participants in the cable programming marketplace to the dominant force in MVPD network programming."[16] Certainly it is true that since 1992 broadcasters have launched a number of successful MVPD channels, which offer consumers a plethora of news, entertainment and sports programming (and which compete head-on with the program offerings of cable owners).

Yet, as the Commission recently recognized, only about one quarter of the nearly 400 national MVPD programming networks available today are commonly owned with broadcast outlets.[17] In fact, the Commission determined that cable operators had ownership interests in 89 national networks, compared to 103 that are owned in common with a broadcast station or network.[18] That hardly suggests dominance. Nearly 200 national channels are not affiliated with either a cable operator or a broadcaster. The data clearly reflect a competitive marketplace in which no single party dominates.

Nonetheless, the Cable Commenters posit that "ownership of national MVPD programming networks" by Fox and the parent companies of broadcast networks ABC, CBS

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16 *See* Comments of Cable Commenters, at 19.

17 *See In Re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227 (released February 4, 2005) (the "*11th Annual Report*"), at para. 15.

18 *See id.*

and NBC has grown from 18.2 percent to 56.5 percent.[19] The only way that the Cable Commenters (and their economic expert) can make this claim – when the Commission's data described above clearly refutes it – is to measure "ownership" of channels by revenues.[20] The Cable Commenters claim that since broadcasters' successful MVPD channels generate a substantial amount of revenue, broadcasters somehow dominate "ownership" of MVPD networks. Of course, the revenues generated by broadcasters' MVPD channels are the result of the broadcasters' success in programming popular channels that consumers enjoy watching, and which consequently warrant higher license fees and generate large amounts of advertising. Regardless of the amount of revenues, though, broadcasters still own only about one quarter of all national networks. If broadcasters' revenues are disproportionately large relative to the number of MVPD channels that they own, it is only because they have fought for and succeeded in obtaining a disproportionately large share of the viewing audience – precisely the type of pro-competitive behavior that the Commission should embrace.

In any event, even if the Commission accepts the Cable Commenters' flawed analysis, the data is still highly misleading. As indicated above, the Cable Commenters assert that the broadcast "ownership" share of MVPD networks has increased from about 18 percent to 56.5 percent since 1993.[21] Cable operators' comparable share, they say, has fallen from 53.6 percent to 25.9 percent in 2004.[22] Yet in 2004, the second largest "owner" of MVPD networks was Viacom, which in 1993 was an owner of cable systems (since sold) and which

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19 *See Comments of Cable Commenters*, at 19; *see also* Rogerson Statement, at Table 3.

20 *See id.*

21 *See id.*

22 *See id.*

did not acquire a broadcast network (or stations) until 2000 – long after RTC went into effect. A proper comparison of cable and broadcast "ownership" of MVPD networks since implementation of RTC, therefore, should exclude Viacom's ownership in the 2004 total for broadcasters. That calculation would reveal that the MVPD networks that were cable-affiliated in 1993 continue to have a larger share of revenue than broadcaster-affiliated MVPD networks. In particular, it would show that broadcasters' "ownership" share grew from about 18 percent to about 39 percent, while cable's "ownership" share went from about 57 percent to about 44 percent. In short, even under their bogus definition of "ownership," the Cable Commenters have wholly failed to demonstrate that RTC has led to broadcaster domination of non-broadcast channels.

Moreover, regardless of the number of MVPD networks that broadcasters own today, RTC is only one of several methods that broadcasters have relied upon to launch new channels and to achieve a competitive position in the MVPD programming marketplace. Fox, in particular, launched one of the most successful MVPD networks – Fox News Channel – without offering RTC in exchange for carriage (except in rare instances). Instead, Fox made cash payments to MVPD operators in the form of launch support – totaling more than half a billion dollars – in order to gain distribution of Fox News Channel.

Indeed, even the Cable Commenters' own expert admits that broadcasters would have moved into the business of offering non-broadcast channels even if they had not been able to offer RTC as a "carrot" to encourage the distribution of those new channels. Specifically, Professor Rogerson explains that, with the repeal of the Commission's fin/syn regulations and the expiration of related consent decrees, movie studios moved to purchase major broadcast networks.[23] In the aftermath of the fin/syn regulations, the studios, and their broadcast networks, had "new incentives to invest in content production" in the form of "economies of scope" between producing programming for both the broadcast network and MVPDs.[24] Thus, Rogerson acknowledges that "the networks would have entered the MVPD network programming industry to some extent regardless of whether or not retransmission consent had been enacted."[25]

C. Broadcasters' Decision to Compete in the MVPD Programming Marketplace Has Enabled RTC to Generate Enormous Benefits for Over-the-Air Broadcasting

The Cable Commenters argue that network broadcasters have used RTC to expand into the MVPD programming market at the expense of over-the-air television.[26] Again they rely on newspaper accounts and qualified conclusions to support this baseless accusation. Yet even the newspaper quotes by Fox executives *cited in the Cable Commenters' pleading* reveal their claim to be meritless. In particular, the Cable Commenters quote News Corporation Chairman and Chief Executive Officer Rupert Murdoch saying: "Like it or not, new competition to broadcasting is inevitable. . . . We ignore that reality at our own peril. Fox and Fox affiliates are far better served by meeting marketplace challenge through expansion into complementary media and integration of those media operations *to the benefit of our core business broadcasting*."[27]

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23 *See* Rogerson Statement, at 13-14.

24 *Id.*

25 *Id.* at 17.

26 *See* Comments of Cable Commenters, at 28-36.

27 *Id.* at 20-21, note 59 (emphasis supplied).

Mr. Murdoch's statement hardly demonstrates that broadcasters entered the MVPD programming market with bad intentions for over-the-air television. On the contrary, the Fox executives cited by the Cable Commenters made clear that Fox's expansion into MVPD programming actually was designed to strengthen its broadcast business. And, in many ways, those plans have borne fruit. Fox's MVPD networks offer programming that complements and reinforces the FOX Network broadcast brand, thereby encouraging viewers to continue to watch the entire family of Fox channels – including Fox's local broadcast stations. For example, *Fox News Sunday*, a one-hour news program produced by Fox News Channel, is shown both on Fox-owned broadcast stations and FOX affiliates, as well as on the Fox News Channel. The FOX Network's live NASCAR racing coverage is regularly promoted during other NASCAR races and related programming carried on FX and Speed Channel. The Cable Commenters criticize broadcasters for "re-purposing" a limited amount of broadcast programming to help introduce audiences to MVPD channels.[28] For Fox, however, the practice of occasionally repeating popular broadcast programming on an MVPD channel represents not only an efficient use of resources, but also an opportunity to reinforce the Fox brand, to introduce new audiences to FOX Network programs, and to entice viewers to return to the FOX broadcast network for new episodes of the "re-purposed" program.

The Cable Commenters also suggest that RTC has not led to improvement in local broadcast news and local programming on network-owned television stations.[29] The one piece of "evidence" they cite is a much-criticized study of broadcast coverage of political

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[28] *See id.* at 33.

[29] *See id.*

news.[30] In contrast to this selective study, though, the 35 Fox owned-and-operated television stations ("O&Os") have an exemplary record of local service – especially when it comes to local news. In fact, across its entire group of O&Os, Fox has increased the number of hours of local news by an average of 69.5 percent each week, compared to the time period prior to Fox's ownership.[31] Fox made most of this investment in local news *after* RTC was enacted, as it has acquired 28 of its 35 O&Os since 1995. Moreover, as demonstrated by the extensive comments and data that Fox submitted as part of the Commission's localism proceeding, Fox recognizes the vital role that broadcasters play in keeping viewers informed in a democratic society.[32] Accordingly, Fox's newscasts often contain extensive coverage of local, state and national political developments.[33]

The Cable Commenters' unsupported and baseless allegations that RTC has failed to strengthen local broadcasting should be ignored by the Commission.[34]

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30 *See id.* The study ("paid for by critics of media consolidation") has been criticized for relying upon data from only 11 of the nation's 210 television markets and for failing to account for the thousands of hours of local news coverage of politics during newscasts outside of the 5:30 – 11 p.m. time period. *See An Incomplete Grade*, Broadcasting & Cable, February 21, 2005; *see also* Dick Kreck, *TV Covers Politics Better Than Study Says*, The Denver Post, February 18, 2005.

31 *See In Re Broadcast Localism*, MB Docket No. 04-233, Comments of Fox Television Holdings, Inc. and Fox Television Stations, Inc. (filed November 1, 2004), at 5.

32 *See id.* at 6-7.

33 *See id.*

34 Rogerson, again, offers only speculation in support of the Cable Commenters' argument: "*[I]t may well be*" that broadcasters have not used RTC revenues to reinvest in broadcasting. Rogerson Statement, at 54 (emphasis supplied). This highly qualified conclusion should not make its way into the Commission's report to Congress. Nor do the Cable Commenters' allegations about broadcasters' commitment to airing quality entertainment programming withstand scrutiny. *See id.* at 34. The Cable Commenters suggest that the broadcast networks' decision to air fewer scripted programs has resulted in a "reduction in . . . broadcast

II. THERE IS NO RELIABLE EVIDENCE THAT RTC HAS HAD ANY IMPACT WHATSOEVER ON CABLE RATE INCREASES

The Cable Commenters also argue that "[i]t is apparent . . . that exercise of retransmission consent by the [major broadcast networks] was a significant driver of increases in cable rates between 1997 and 2004."[35] In particular, they blame the addition of new MVPD channels – many of which have been launched as the result of RTC.[36] The data submitted by the Cable Commenters, however, is entirely unreliable. Neither Professor Rogerson nor the Cable Commenters conducted a multivariate regression analysis, controlling for relevant factors, to ascertain whether cable rate increases bear any relationship to the RTC process. In fact, there may be a variety of explanations as to why license fees may have increased more rapidly for broadcaster-affiliated MVPD networks than other MVPD networks – not the least of which is the disproportionate popularity of the broadcasters' channels (*see supra*, at 7). And, as even the Cable Commenters' data demonstrates, once license fee increases attributable to sports networks (such as ESPN) are removed from the equation, there is really only a modest difference in the rate of increases between broadcaster-affiliated channels and other channels.[37]

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quality." *Id.* This claim conveniently ignores the fact that viewers have been flocking to alternative, non-scripted shows, and broadcasters have been meeting this demand with quality programs. Indeed, five of the top 10 rated shows on television during the first week of March 2005 were non-scripted programs, including Fox's *American Idol*, which attracted nearly 80 million viewers over three nights. In any event, even Professor Rogerson's data (Rogerson Statement, at Table 11) confirms that broadcasters today are spending twice as much on annual programming costs – nearly $12 billion – than they were at the advent of the RTC era in 1993.

35 *See* Comments of Cable Commenters, at 48.

36 *Id.* at 43.

37 *See id.* at 49 & Table I.

Moreover, the Cable Commenters' argument naively assumes that, in the absence of RTC, no new channels (or far fewer new channels) would have been launched. The reality of course is that even if no broadcast affiliated channels had been launched in the last 12 years, cable operators would not have intentionally under-utilized their expanding channel capacity. Rather, additional channels still would have been launched. Even the Cable Commenters' expert is unwilling to offer unqualified support to their argument, saying only that RTC "likely played" a role in price increases.[38] But he too fails to acknowledge that, absent RTC, new channels still would have been launched.

Accordingly, the Commission should not allow the Cable Commenters' unsupported arguments to color the report to Congress.

III. BROADCASTERS DO NOT FORCE MVPDs TO ACCEPT BUNDLING OF RTC AND CARRIAGE

Broadcasters in general – and Fox in particular – are fully willing to negotiate with cable operators in good faith for RTC.[39] Fox is happy to renew here its pledge to always offer cable operators multiple options – including cash – for consideration in exchange for letting the cable operators carry the valuable programming provided by the Fox O&O broadcast stations.[40] To the degree that the cable industry remains steadfastly opposed to paying cash,[41] Fox will continue to bargain in good faith for alternate forms of consideration (including carriage of affiliated programming channels).

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38 *See* Rogerson Statement, at 19.

39 *See* Video Competition Comments, at 2.

40 *See id.*

41 *See id.*, at 3. *See also* Linda Moss, *MSOs Draw Line at Cash for Carriage*, Multichannel News, January 3, 2005. Nexstar Broadcasting Group, Inc., for instance,

EchoStar suggests that broadcasters' conduct in the negotiation of RTC constitutes a "*per se* violation of the antitrust laws."[42] In particular, EchoStar argues that broadcasters engage in "illegal" tying of two products: local broadcast stations and affiliated MVPD networks.[43] Even EchoStar acknowledges, however, that tying arrangements are illegal *only* when "there are two separate products with the sale of one being *conditioned* on the purchase of another."[44] As made clear above, Fox does *not* condition an MVPD's right to purchase its broadcast signals on an obligation that the MVPD also purchase an affiliated channel. Fox does lawfully include carriage of affiliated channels among the types of consideration that it will accept in exchange for RTC for its broadcast signals. But Fox does not insist on carriage; rather, it is willing to consider cash or any other form of consideration about which an MVPD desires to negotiate.

Indeed, the Commission's rules specifically prohibit broadcasters from engaging in take-it-or-leave it bargaining when it comes to RTC.[45] Consequently, broadcasters simply cannot "condition" the grant of RTC upon an absolute demand that an MVPD carry an affiliated channel. Broadcasters can and do negotiate for carriage (as well as for cash) – but a desire to negotiate to reach a specified outcome does not amount to illegal tying.

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has pulled its broadcast stations off of several Cox cable systems because of Cox's refusal to negotiate a cash payment in exchange for RTC. Two cable operators – including Cox – "say[ ] that as a policy they don't pay broadcasters license fees for retransmission consent," and a cable spokesman said "[w]e refuse to pay cash . . . ." *Id.*

42 *See* Comments of EchoStar, at ii, 4.

43 *Id.*

44 *Id.* (emphasis supplied).

45 *See* 47 C.F.R. § 76.65(b).

IV. CONCLUSION

In sum, the RTC process has worked well for more than a decade to provide broadcasters, MVPDs and consumers a broad array of benefits. In light of the cable operators' refusal to consider cash consideration 12 years ago, broadcasters have used the RTC process to negotiate for carriage of what are now some of the most popular, high quality MVPD networks available. Broadcasters have utilized their wealth of experience as the preeminent suppliers of television content to create MVPD channels that are enjoyed by millions of consumers each day. They have embraced a pro-competitive strategy of challenging MVPDs for eyeballs and advertising revenues – and they have succeeded. Despite this reality, a few cable operators and EchoStar have asked the Commission to tell Congress that the RTC process is somehow flawed. The Commission should reject their invitation and should instead reaffirm that, when both sides bargain together in good faith, consumers reap the benefits.

Respectfully submitted,

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Their Attorneys

March 31, 2005

Tab D

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 208 of the Satellite Home Viewer Extension and Reauthorization Act Of 2004	)	MB Docket No. 05-28
	)	
Report to Congress	)	
	)	

JOINT REPLY COMMENTS OF NBC UNIVERSAL, INC.
AND NBC TELEMUNDO LICENSE CO.

This docket is intended to examine a very narrow question: to what extent do the slight differences in the Commission's established policies on retransmission consent, network non-duplication and syndicated exclusivity vis-à-vis cable operators and DBS providers adversely affect the multichannel video programming distribution market? [1] Some comments address this very narrow question that, at most, intends to tweak what are long-settled Commission policies. [2] Others, however, instead use this limited docket to resurrect long-settled issues regarding the very principles underlying retransmission consent and the Commission's local station exclusivity policies.

Retransmission consent is not just an aspect of the free market; it is the free market. Retransmission consent is nothing more than allowing a free, over the air broadcast station to decide not to relinquish its most valuable asset – its programming – to a competitor and get nothing in exchange. Similarly, network nonduplication and syndicated exclusivity policies enable the enforcement of private

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1 See FCC Public Notice, *Media Bureau Seeks Comment for Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace*, DA 05-169 (Jan. 25, 2005).

2 *See, e.g.*, Comments of the National Association of Broadcasters, *Implementation of Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (filed March 1, 2005).

parties' exclusivity agreements (within a specified geographic area) against parties that may not be privy to those agreements (i.e., cable operators). None of the comments in this proceeding has offered any basis for the government to interfere with these workings of the free market.

Government Has Long Recognized That Retransmission Consent and Limited Exclusivity Protections Strengthen the Free Market in Video Programming

Both retransmission consent and network and syndicated exclusivity have long been determined to serve the public interest. More than a decade ago, Congress concluded that local television broadcast stations should not be forced to give away their valuable programming assets to cable operators, which in turn used the stations' signals to sell cable services to subscribers, the effect of which was to reduce the viewers of and advertisers on those stations.

Congressional passage of the Cable Television Consumer Protection and Competition Act of 1992 expressly intended to end what had been an extraordinary exception to the fundamental free-market principles. Under Commission's Rules in place during the 1970s, cable operators could resell local television stations' programming to their subscribers without having to ever obtain the right to distribute that programming from those local stations. This sweeping exception to local stations' fundamental property rights as a means of subsidizing the cable industry when that industry's primary purpose was to retransmit broadcast programming to households that could not easily receive that programming over the air.

In passing the 1992 Cable Act, Congress expressly recognized that the conditions that arguably justified this extraordinary exception no longer applied *and* that failure to eliminate this exception was resulting in cable having an undue and unjustifiable advantage: [3]

> [B]roadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations. . . Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of

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[3] Cable Television Consumer Protection and Competition Act of 1992, H.R. Conf. Rep. 102-862 (dated Sept. 14, 1992) (Findings at 19) (the "1992 Cable Act").

> the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the two industries.

Accordingly, Congress, through the 1992 Cable Act, eliminated this narrow exception and restored free-market negotiations with respect to cable retransmission and reselling of local stations' broadcast content.

Just five years ago, Congress implicitly endorsed its prior conclusion with respect to the satellite industry (even though the DBS industry was less secure at that time than its cable competitors) when Congress employed a similar market-based retransmission consent regime for local-into-local carriage by DBS providers. Just last year, Congress again chose not to alter retransmission consent in passing the Satellite Home Viewer Extension and Reauthorization Act of 2004; indeed, that Act took further steps to ensure that local television stations are able to continue to serve their local communities.

Similarly, forms of syndicated and network programming exclusivity have been effective for many years. The purpose of these policies is not just to protect local stations' service to their local communities, but also to ensure that a station can enforce its bargained-for network or syndicated exclusivity vis-à-vis a cable operator (within specified geographic zones). The policies offer a further key public benefit: they enable a program producer to better reclaim the value of its program in multiple markets, which increases the likelihood that such programming will continue to be produced.

The Free Market, Embodied by Retransmission Consent, Has Been an Overwhelming Success for Stations, Operators and Consumers

Retransmission consent conveys an overwhelmingly practical benefit: it works. Retransmission consent has been available for more than a decade; and the occasions when cable operators and broadcast stations have been unable to come to an agreement are few – even though cable operators have been unwilling to pay a license fee in exchange for the valuable right to retransmit a local stations' programming.

Retransmission consent works because, as a rule, the free market works. Private program negotiations work between broadcasters and cable operators in just the same way as between cable services and cable operators. Dozens of cable networks negotiate agreements with cable operators (including rural cable operators) for the right to distribute that network's programming to subscribers. Retransmission consent is simply another name for the same negotiation process as employed by broadcasters.

There is one important difference in the negotiations between local television stations and cable operators from those between cable networks and cable operators. Most notably, as a rule, cable operators have refused to pay licensee fees in exchange for the right to distribute the programming of local television stations (notwithstanding that these stations allegedly offer "must have" programming). [4] In this proceeding, some parties have explained that cable operators initially did not want to pay for carriage when retransmission consent became the law of the land because of rate regulation.[5] Now, however, it is not at all clear what their justification is, as nearly a decade has passed since such rate regulation was eliminated.

The free market does not mean anyone should expect to get others' property for free; absent the real likelihood of anticompetitive conduct, the free market expects that private parties negotiate the terms (including compensation) for which a buyer is willing to pay to a seller for its product and services without government interference. [6] Moreover, stations, like other retailers, have the right to market their product

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4 *See* Anne Veigle, *Cox Puts 4 Cable Systems on Block to Reduce Debt,"* Communications Daily at 3-4 (Mar. 9, 2005) (retransmission consent negotiations between Nexstar Broadcasting, which owns local stations in Abilene, TX and San Angelo, TX, and Cox Communications, the market's dominant cable operator, have reached an impasse over the request by broadcaster that the cable operator pay 30 cents per subscriber – a fee less than that commanded by many cable networks – for the station's network and local news, sports and entertainment programming); John M. Higgins and Bill McConnell, *No Cash, No Carry: Digital Broadcasting Reignites the Fight Over Whether Cable Operators Should Pay to Carry TV Stations,"* Broadcasting and Cable at 20 (Feb. 7, 2005) (Nexstar/Cox "scuffle is playing out across the country between local broadcasters, which want cash from cable systems carrying their signals, and cable operators, which don't want to pay.")

5 Joint Cable Comments at 7.

6 *See* Report on the Packaging and Sale of Video Programming Services to the Public at 80 (submitted by Federal Communications Commission to House Committee on Energy and Commerce on Nov. 18, 2004) ("A La

differently to different classes of consumers. Stations, unlike cable operators, choose, as a public service, to deliver their programming over the stations' wireless systems directly to consumers for free. That public service does not include donating content to their cable operator competitors, who then profit from that same programming by re-selling it to consumers for a monthly fee *and* by attracting advertisers away who would otherwise buy advertising time on those local stations. In this respect, local stations are no different from the bulk goods manufacturer that labels its products with the warning: "Not for individual resale."

Faced with the overwhelming free-market justifications for retransmission consent, critics seek to entice regulators to interfere with the free market by claiming that specific programming is "must have" because it is currently popular. First, the temporary popularity of specific programming among a limited segment of consumers does not constitute market power any more than the fact that an individual subset of consumers may prefer a favorite restaurant, especially as viewers of the station can change their minds by a simple point and click of the remote. [7] Second, such allegedly "must have" programming has not precluded the recent loss of viewers from free to pay television options: amid the hundreds of new channel options offered by local stations' cable operator competitors, all free, over-the-air television stations now collectively receive less than half of the nation's viewership.

The conditions imposed on the recent merger of Fox and DirecTV do not indicate otherwise. In that instance, Fox, a broadcaster and cable network owner with substantial valuable content, was seeking Commission approval to acquire a multichannel video programming distributor that, at least in some

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Carte Report") (stating that traditional antitrust claims are sufficient to maintain competitiveness of programming redistribution market); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 325(b)) (conditioning right of cable system to retransmit local programming on retransmission consent or a mandatory carriage election).

[7] The ephemeral nature of such alleged "market power" is evident even within these critics' comments: one commenter classifies as "must have" several network entertainment programs that had been terminated by their network before this proceeding even commenced. *See* Joint Cable Comments at 13.

circumstances, competes with cable operators. [8] The argument for the conditions (to which Fox voluntarily agreed) was that the acquisition of a substantial ownership stake in DirecTV afforded Fox the means, motive and opportunity to profit directly by denying other multichannel video programming distributors access to Fox's admittedly valuable content. [9]

Even assuming that that assertion was accurate, the circumstances of that case are obviously the exception, not the rule. The overwhelming majority of television stations premise their business plans on attracting the largest audience (either overall or in targeted demographics) possible. It does not uniquely and materially benefit the typical television station to attract its audience over the television station's own wireless distribution system as opposed to cable or other multichannel systems: because the station does not demand that a consumer pay to receive the station's over-the-air signal, the station does not benefit from directing consumers to rely on an over-the-air signal, especially when other local station competitors remain available on cable systems.

The Commission has recognized as much. In its A La Carte report to Congress, which postdates the *Fox-DirecTV* decision, the Commission underscored that no special measures are needed to protect cable operators from local television stations.[10] The Commission instead deemed antitrust law to be more than sufficient protection against any local television station exercising market power or engaging in material anticompetitive conduct. [11]

The available evidence also does not support the claim that retransmission consent has led to excessively high cable rates. Fundamentally speaking, that cable operators are forced to compensate others for using their property – whether that property is electricity or labor or a digital server – will increase

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8 *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, FCC 03-330, at ¶ 3 (2004).

9 *See id.* at 476-77 (¶ 4).

10 A La Carte Report at 80.

11 *Id.*

the costs of the cable operator. But the fact that a cable operator has to pay fair value for the inputs on which it bases its "product" hardly offers a sufficient basis for government intervention, whether the costs result from the operator's need for power or workers or equipment or program content.

Second, there is no evidence that cable operators are "paying" television stations anything in excess of the fair market value of the stations' content. [12] As noted, cable operators across the nation continue to refuse to pay cash in private retransmission consent dealings. Indeed, recent events demonstrate that some cable operators refuse to pay even 30 cents per subscriber to carry a local NBC affiliate's or other network affiliate's programming. [13] Accordingly, cable operators get many stations' content at no cost (except for minor concessions like better channel placement). Further, to the extent cable operators agree to carry a station group's commonly owned cable networks in exchange for the stations' retransmission consent, recent government reports have confirmed that these networks receive license fees entirely consistent with that of similar networks that are unaffiliated with a broadcaster. As many cable operators have paid nothing for local stations, and paid going rates for other affiliated cable networks, it is impossible to conclude that higher cable rates are driven by retransmission consent.

No Other Alleged Concern Justifies Government Disruption of the Established and Smoothly Functioning Programming Market

As for the other generalized complaints regarding retransmission consent, none justify government interference in the negotiations of private parties. By way of example, three significant arguments against retransmission consent actually demonstrate the public utility of the policy.

First, some critics complain that retransmission consent has resulted in more high quality cable networks. For example, the Joint Cable Commenters complain that news channels like MSNBC and Fox News were only able to be launched thanks to cable operators' negotiations to resell the broadcast

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12 *See* U.S. General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 (October 2003).

13 *See* Veigle, *supra* note 4.

programming of NBC's and Fox's owned television stations. Undeniably, the presence of such 24-hour national news channels has benefited the public. Moreover, many cable operators agree that these programming services have benefited cable operators. Earlier this year, the trade publication *Multichannel News* released the results of a survey of cable systems asking them to identify their favorite network groups. Among the top 10 were the following network organizations: NBC Universal Cable, ESPN (owned by Disney), MTV Networks (owned by Viacom/CBS) and Fox News Channel. [14] As these retransmission-fueled networks have benefited the public and cable operators alike, these examples illustrate the benefits, not drawbacks, of the retransmission consent policy.

Second, retransmission consent has not resulted in the alleged domination of the cable network universe by broadcasters. Retransmission consent played, at most, a limited role in the current number of cable networks owned by broadcasters. For example, the Joint Cable Commenters have pointed to one cable network – MSNBC – that NBCU has developed through retransmission consent. [15] Of NBCU's four other leading cable networks – CNBC, Bravo, Universal and the SciFi Channel – NBCU acquired three only after each was already available in 60 million or more homes. The Commenters do not explain how retransmission consent was essential to the success of these networks when these cable networks achieved most or all of their current distribution prior to NBCU's ownership.

These comments also ignore the many other reasons why cable networks that are commonly owned by a broadcast network often succeed; put simply, broadcast networks are outstanding programmers. The Bravo cable network had substantial distribution before NBCU acquired it – but the hits that aired after NBCU acquired the network – including "Queer Eye for the Straight Guy" – were what made Bravo a cultural phenomenon.

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[14] Broadcasting & Cable/Multichannel News, Local Cable Ad Sales Electronic Newsletter at 2 (dated March 22, 2005) (reporting that Beta Research has polled executives at individual cable affiliates to determine which cable networks – or families of cable networks – provide the most satisfactory product).

[15] Joint Cable Comments at 9, 10.

Third, critics complain that broadcasters have not used retransmission consent to develop "more and better broadcast offerings."[16] It is not clear what this means (especially given the converse complaint of some that stations offer "must have" programming). As to "more" offerings, until more television households have access to digital multicast programming, a local station only has the technical ability to offer a single program at a time. As for "better" offerings, it should be recalled that, in a universe of hundreds of television channels, broadcasters still capture about half the nation's viewers. Accordingly, stations have done what they could to continue to improve the product they deliver consumers.

Moreover, when local stations do offer "more and better" broadcast offerings, cable has not always been receptive. NBC WeatherPlus is both a "more and better" broadcast offering, which offers unique round-the-clock coverage of local and, secondarily, national weather. But the Joint Cable Comments nonetheless complain that NBCU may use retransmission consent negotiations to push for carriage of NBC WeatherPlus, while simultaneously alleging that the intended purpose of retransmission consent was to facilitate cable carriage of such "more and better" programming.[17]

Fourth, the differences between retransmission consent vis-à-vis cable and DBS have not been demonstrated to justify any such significant change in the policy, never mind the sweeping elimination or reduction of retransmission consent. As retransmission consent is just jargon for the free market, a similar free-market policy should apply to both services.

Conclusion

In passing the 1992 Cable Act, Congress clearly explained that in a media environment where cable systems actively "compete with local broadcasters for programming, audience, and advertising" is inappropriate and anticompetitive to permit cable systems to take local broadcaster content and not compensate the broadcaster.

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16 *Id.* at 28.

17 *Id.* at 12.

Furthermore, the issues presented in this proceeding reflect the fundamental difference between cable operators and local television stations: today's consolidated cable operators operate in a national market generally without regard for the location of the network; by contrast, local stations routinely focus on their local communities. Accordingly, cable operators see a remote network affiliate as roughly equivalent for that network's local affiliate. Or they view NBC Network and its affiliates as a single coherent entity, when the truth is the NBC affiliates include scores of different (and often competing) ownership groups.

The Commission, on the other hand, has recognized the difference between local stations and national networks since the very advent of broadcast networks. That difference between local and national is reflected in many Commission's policies, ranging from the exclusivity policies to the local ownership rules. The attack against retransmission consent and the Commission's exclusivity policies neither serves consumers nor stations that value such a local commitment. Accordingly, the Commission should maintain each of these policies.

Respectfully submitted,

NBC UNIVERSAL, INC. and
NBC TELEMUNDO LICENSE CO.

By: F. William LeBeau

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Their Assistant Secretary and Senior Regulatory Counsel

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March 31, 2005

Tab E

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace	)	MB Docket No. 05-28
	)	

To: Secretary, Federal Communications Commission

REPLY COMMENTS

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EXECUTIVE SUMMARY

Congress enacted retransmission consent in 1992 in recognition of the fact that broadcasters have the right to require consent and compensation before another entity distributes their product. Nothing has changed in the marketplace since 1992 to justify any modifications to the statute or its implementing regulations.

Disney's reasonable retransmission consent practices comply with the statute and Commission decisions on retransmission consent. Disney negotiates retransmission consent only for the ten ABC Owned Stations. Disney does not require multichannel video programming distributors ("MVPDs") to carry any Disney-owned cable network to obtain retransmission consent but instead offers a reasonable stand-alone cash retransmission consent proposal as an alternative.

The retransmission consent practices challenged by MVPDs were conceived as an accommodation to cable operators who refused to pay cash for retransmission consent after the statute was enacted. Moreover, in enacting retransmission consent, Congress specifically anticipated agreements by cable operators to distribute new cable programming services as an alternative to cash payments and the Commission has affirmed the use of these types of transactions on several occasions.

Contrary to the assertions of the Joint Cable Commenters and Professor Rogerson, retransmission consent is not responsible for increased cable costs. Rather, non-programming costs, such as costs associated with offering new broadband services or the transition to digital television, drive cable rates. Additionally, as explained in a report attached as Exhibit B to these reply comments, when adjusted to account for improvements in service quality, cable rates are not increasing rapidly as Professor Rogerson claims.

To remedy perceived problems with retransmission consent, several commenters propose that the conditions imposed in the News Corp./Direct TV transaction be extended to all broadcasters. However, the rationale for imposing these conditions—the potential harm to competition in the vertical broadcast-distribution MVPD market—does not apply to retransmission consent generally because most broadcasters are not affiliated with an MVPD. Suggestions that all retransmission consent disputes be submitted to mandatory arbitration are equally unwarranted. In fact, commenters are unable to cite a single case where the Commission sanctioned a broadcaster for violating its obligation to negotiate in good faith.

Similarly, arguments that the broadcast exclusivity rules should be revised cannot be justified. Modifications to the broadcast exclusivity rules suggested by the MVPDs would upset the carefully legislated balance of negotiating power between broadcasters and MVPDs and would ultimately render a broadcaster's retransmission consent rights meaningless. Additionally, changes to the broadcast exclusivity rules would harm localism. The broadcast exclusivity rules promote the Commission's long-standing goal of localism by: (i) providing MVPD subscribers with access to local content produced by broadcasters and (ii) giving broadcasters the audience levels they need to justify producing expensive local content. Further, the broadcast exclusivity rules, which enable networks and broadcasters to negotiate programming exclusivity without interference from the government, are essential to the continued viability of the network-affiliate system.

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REPLY COMMENTS

Pursuant to Section 1.415 of the rules of the Federal Communications Commission ("FCC" or "Commission"), The Walt Disney Company ("Disney")[1], through its attorneys, hereby submits reply comments ("Reply Comments") in the above-captioned proceeding in which the FCC seeks comment on the impact of the retransmission consent, network nonduplication, syndicated exclusivity, and sports blackout rules on competition in the multichannel video programming ("MVPD") market. As further set forth below, there is no need for the government to revise the current statutes or regulations governing retransmission consent,[2] network nonduplication,[3] or syndicated exclusivity.[4]

[1] The specific entities are: (i) ESPN, Inc. (80% owned by Disney) ("ESPN"), (ii) ABC Cable Networks Group (including The Disney Channel, ABC Family, Toon Disney and SoapNet), and (iii) the ABC Television Network ("ABC") and the ABC owned television stations ("ABC Owned Stations"). ABC and the ABC Owned Stations are ultimately owned by Disney.

[2] 47 U.S.C. § 325(b); 47 C.F.R. § 76.64-70.

[3] 47 C.F.R. § 76.120-122 and 76.92-95.

[4] 47 C.F.R. § 76.101-110, § 76.120, and § 76.123-125.

I. There is No Need to Revise the Current Statutes or Regulations Governing Retransmission Consent

A. Congress's Rationale For Enacting Retransmission Consent in 1992—that Broadcasters Have the Right to Require Consent Before Another Entity Distributes Their Product—Remains Equally Valid In Today's Marketplace

The Cable Television Consumer Protection Act of 1992 ("1992 Cable Act") requires cable systems to obtain the consent of, and to compensate the owner of, a broadcast channel before distributing that channel to consumers.[5] Prior to 1992, cable operators were able to obtain broadcast stations off air, distribute them to consumers, and keep the proceeds. In passing the 1992 Cable Act, Congress concluded that "a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals" and public policy should not support a system "under which broadcasters in effect subsidize the establishment of their chief competitors."[6] Congress further explained that "[c]able operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should not be treated differently."[7] In sum, Congress concluded that broadcasters, like all other programmers, have the right to require consent and compensation before another entity distributes their product.

Although the 1992 Cable Act merely equalized the competitive balance between broadcasters and cable operators, several commenters in this proceeding have made various allegations of broadcaster "abuses" of retransmission consent.[8] The essence of these allegations is the desire of a few distributors to return to a pre-1992 regime under which they enjoyed a

[5] Cable Television Consumer Protection and Competition Act of 1992, Pub. Law No. 102-385, 106 Stat. 1460 (1992).

[6] S. REP. NO. 102-92, at 35 (1991).

[7] *Id*.

[8] *See, e.g.*, Comments of Joint Cable Commenters, at 6-18; Comments of EchoStar Satellite L.L.C., at 3-8; Comments of the American Cable Association, at 7.

significant advantage over broadcasters, who had virtually no way to protect their content from being redistributed by MVPDs. Absent from these commenters' arguments is any valid explanation of what has changed since 1992 that would justify returning to the pre-1992 system.

One supposed justification proffered by commenters is the alleged inappropriate exchange of broadcast station retransmission consent for the carriage of cable channels under common ownership with the broadcaster. However, what these commenters fail to address sufficiently is that both Congress and the Commission consistently have approved of this practice. Notably, Congress specifically anticipated that the compensation paid by the cable operator to the broadcast station could take the form of "the right to program an additional channel on a cable system."[9] Recognizing the resulting public interest benefits, the Commission has affirmed the acceptability of such arrangements on several occasions. For example, in March 2000, the Commission ruled that—in the SHVIA context—proposals for carriage of a broadcast signal contingent on "carriage of any other programming, such as … an affiliated cable programming service" are "consistent with competitive marketplace considerations."[10] In 2001, the Commission again stated that "offering retransmission consent in exchange for the carriage of other programming such as a cable channel" is "consistent with competitive marketplace considerations" and that "[g]ood faith negotiation requires only that the broadcaster at least consider some other form of consideration if the MVPD cannot accommodate such carriage."[11]

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[9] S. REP. NO. 102-92, at 36.

[10] *Implementation of the Satellite Home Viewer Improvement Act of 1999 – Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5469 (2000) ("*Good Faith Negotiation Order*").

[11] *EchoStar Satellite Corporation v. Young Broadcasting*, 16 FCC Rcd 15070, 15079 (Aug. 6, 2001).

Most recently, the Commission confirmed that antitrust laws, rather than FCC-imposed regulations, should govern any dispute over allegedly unlawful tying practices.[12]

Any departure from this established precedent would have to be supported by a well-founded reason for the change. However, nothing has happened since enactment of retransmission consent in 1992 to justify any changes to the statute or its implementing regulations. Instead, the fundamental notion behind retransmission consent remains as relevant today as it was in 1992: broadcasters—like any business—should be compensated for their product if distributed and sold by another entity. Broadcasters continue to invest billions of dollars annually to create the most valuable and most desired television programming in the industry and should have the right to be compensated for that product.

B. Disney's Retransmission Consent Practices Are Reasonable, Not Abusive

Several commenters assert that network broadcasters, including Disney/ABC, engage in allegedly "abusive" retransmission consent practices such as tying retransmission consent to carriage of cable networks or affiliate television stations.[13] As noted above, retransmission consent arrangements involving agreements to carry program services are in accordance with the 1992 Cable Act and Commission decisions. Moreover, as detailed below, Disney's retransmission consent practices are reasonable.[14]

[12] *See Report on the Packaging and Sale of Video Programming Services to the Public*, at 80 (2004) ("*A La Carte Report*"). ("Nonetheless, the current retransmission consent process is a function of the statutory framework adopted by Congress and we cannot conclude that it is not working as intended. To the extent tying arrangements for carriage of particular programming is being used for anti-competitive ends, the antitrust laws provide an adequate remedy.").

[13] *See, e.g.*, Comments of Joint Cable Commenters, at 6-18; Comments of EchoStar Satellite L.L.C., at 3-8.

[14] These reasonable practices enabled Disney to conclude approximately 60 retransmission consent deals in the last cycle.

1. Disney Offers ABC on a Standalone Basis

As an initial matter, Disney negotiates retransmission consent only for its ten ABC Owned Stations (which have a 24% national reach) and does not negotiate on behalf of independently owned affiliate stations. Importantly, Disney does not require MVPDs to carry any ABC/Disney/ESPN cable network in order to obtain consent to retransmit any of its ten ABC Owned Stations. Instead, Disney offers MVPDs a stand-alone cash retransmission consent proposal for each of its ABC Owned Stations. This offer (in the range of $0.70 - 0.80 per subscriber per month) was made to each MVPD that was part of the last round of ABC's retransmission consent negotiations. If an MVPD agreed to a cash ABC retransmission deal, that MVPD was under no obligation to carry any other ABC/Disney/ESPN channel.[15]

In its initial comments in this proceeding ("Initial Comments"), Disney established that ABC's stand-alone retransmission consent price is completely reasonable and, in fact, understates the actual value of the ABC programming. As explained in the Initial Comments, Disney submitted an economic study, as part of the FCC's a la carte proceeding, that determined the fair market value of three of the ABC Owned Stations ("Retransmission Consent Economic

[15] To again confirm Disney's practices with respect to retransmission consent agreements for carrying the ABC Owned Stations, Disney is attaching the declaration executed by Ben Pyne, Executive Vice President, Disney and ESPN Networks Affiliate Sales and Marketing, on February 3, 2003. Mr. Pyne is the individual who is responsible for working with the ABC Owned Stations to negotiate retransmission agreements. In his declaration, Mr. Pyne certifies that, "in negotiating for retransmission consent, ABC offers MVPDs a cash stand-alone price for retransmission consent for the ABC Owned Stations. If the cable operator accepts that offer, that decision results in no additional obligation to carry any Disney/ABC programming. To the extent that any given MVPD decides not to accept ABC's stand-alone cash offer, and instead elects the alternative to negotiate to carry programming, that decision is made by the individual MVPD. We attempt to work with the MVPD to customize a reasonable offer to address their particular needs." *See* Declaration attached as Exhibit A.

Analysis").[16] The Retransmission Consent Economic Analysis concluded – based on three different approaches to assess the value of the ABC Owned Stations – that the average value of these stations ranged between $2.00 and $2.09 per subscriber per month, well in excess of the $0.70-0.80 per subscriber per month that ABC offers MVPDs.

2. *Disney Offers Cable Operators Additional Flexibility*

When negotiating with MVPDs—including the smaller rural carriers that may not be able to upgrade their plant in face of competition from advanced digital satellite services, Disney offers flexibility in striking a retransmission consent deal. For example, some small cable operators wish to retransmit an ABC Owned Station (but do not want to pay cash for the carriage), and yet they lack sufficient capacity on the same cable system to carry commonly-owned cable channels. In these instances, ABC has agreed to allow carriage of its station in market A in return for cable carriage of a commonly owned channel in market B where the cable operator does have sufficient channel capacity.[17] And, ABC will continue to work in good faith to accommodate the needs of smaller cable system operators. These practices are accommodations—not abuses—and in no way argue in favor of changes in retransmission consent.

Disney also permits MVPDs to obtain a license for its most popular individual cable channels without being obligated to obtain a license for any other Disney owned service. For example, an MVPD may elect to obtain a license for the Disney Channel but not Toon Disney, or

[16] *See* Michael G. Baumann and Kent W. Mikkelsen, THE FAIR MARKET VALUE OF LOCAL CABLE RETRANSMISSION RIGHTS FOR SELECTED ABC OWNED STATIONS (July 15, 2004).

[17] Ironically, this good faith accommodation by Disney has been twisted by a few operators into an allegation of bad faith. In fact, the flexibility to allow the retransmission consent compensation to occur in a different market is an accommodation to capacity constraints of the cable system owner.

may enter into standalone license agreements for SOAPnet or ABC Family. Further, a distribution license for ESPN does not obligate the cable or satellite operator to carry ESPN2, ESPN Classic or ESPNEWS.[18]

In addition to providing flexibility, Disney's contracting practices are in accordance with the Commission's intention to allow private negotiations to govern tier placement requirements. All tier placements of the Disney-owned cable channels are the result of private contractual negotiations between Disney and the MVPDs. As the Commission has acknowledged in its recent report on the packaging and sale of video programming services ("*A La Carte Report*"), "[t]ier placement requirements . . . are best left to commercial negotiations between MVPDs and program networks."[19] Antitrust law, rather than modifications to retransmission consent, provides a remedy for parties harmed by anti-competitive conduct.[20]

C. MVPDs Established the Retransmission Consent Practices <u>That They Now Challenge as Abusive</u>

As noted in Section I.A above, prior to 1992, cable operators distributed local broadcast signals without the consent of station owners. After the 1992 change in the law, many leading cable operators announced that they never would pay cash to a broadcaster for retransmission

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[18] While ESPN offers the original "ESPN" channel on a standalone basis, it distributes the complementary ESPN-branded services (ESPN2, ESPNEWS and ESPN Classic) only to those distributors who have licensed the original basic "ESPN," and those distributors may then choose to license—or not to license—any one or more of the complementary ESPN-branded channels. Similarly, when Toon Disney was first launched, it was made available as a complementary service only to those distributors who licensed Disney Channel. Since that time, Disney's policy has changed, and as a more mature service, Toon Disney is now offered to new licensees of the service on a standalone basis. Certain Toon Disney agreements that were executed under the original distribution policy are still in effect, but as they are renewed, the new policy is applied.

[19] *A La Carte Report*, at 80.

[20] *Id*.

consent.[21] As the statutory deadline approached for completion of retransmission consent deals, a standoff ensued between the broadcasters and the cable operators.[22] This standoff threatened the continued cable carriage of many local broadcast stations.[23] This standoff was resolved when three of the then four major broadcast networks agreed to cable operators' proposals to grant retransmission consent for network-owned stations in return for cable carriage of, and payment for, new network-owned cable channels.[24] In return for granting broadcast retransmission consent, Fox created the cable network FX, ABC produced and distributed ESPN2 and NBC launched "America's Talking" (which later became MSNBC).[25]

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[21] *See* Mark Robichaux, *Tele-Communications Says It Will Fail to Meet Deadline on TV Stations' Fees*, THE WALL STREET JOURNAL, Aug. 18, 1993, at B8 ("Nearly all of the nation's largest cable operators have vowed to forgo paying cash to local TV stations."). The cable operators' prospective refusal to pay for retransmission rights was so uniform that Senator Daniel Inouye of Hawaii asked the Justice Department and the Federal Trade Commission to investigate whether the cable companies violated antitrust laws by improperly colluding with each other. *Id.*; *see also* Rachel W. Thompson, *Inouye to Cable: Why No Cash?*, MULTICHANNEL NEWS, Aug. 16, 1993.

[22] *See, e.g.*, Ted Sherman, *Consumers Loom as Losers in Battle Between Cable, Broadcast Firms*, THE NEWARK STAR-LEDGER, Sept. 13, 1993 (noting that after 1992 Cable Act established retransmission consent requirements, "[a]lmost every broadcaster initially demanded the cash [and] at the same time, nearly all cable operators said no, threatening to dump the on-air broadcast stations come Oct. 6, when the [retransmission consent] provision takes hold"); Robichaux, *supra* note 21 ("Delays in meeting the October deadline have been caused in part by the face-off between TV stations demanding new cash fees and cable systems steadfastly refusing to pay.").

[23] *See, e.g.*, Jeannine Aversa, Rachel W. Thompson & Rod Granger, *Storm Still Brews in Conn. as FCC Readies Final Must-Carry Rules*, MULTICHANNEL NEWS, Mar. 8, 1993 (noting Cablevision's threat to drop several broadcast stations, including those in Boston and Hartford/New Haven "if they don't forgo payment for carriage"). Some cable operators, including Cablevision, said they would offer subscribers switches to easily obtain broadcast programming over the air rather than pay broadcasters for their signals. *See* Sherman, *supra* note 22.

[24] *See* Sherman, note 22 ("Instead [of cash], the cable operators have been offering to swap spare channel capacity to the broadcasters for new cable programming that all networks are developing, in return for the right to retransmit regular, over-the-air programming.").

[25] *See* Sherman, *supra* note 22 (describing cable channels for which ABC, Fox, NBC and CBS negotiated carriage).

There are two critical points to make regarding these agreements which established the pattern of granting broadcast retransmission consent in return for carriage of commonly owned cable channels. First, these alternatives were conceived by cable operators[26] who—notwithstanding the 1992 Act—refused to pay cash for broadcast retransmission consent and were an accommodation to this refusal.[27] Second, as discussed above, these alternatives had been specifically anticipated and approved in the Senate Report to the 1992 Act.[28] Thus, it is MVPDs and not broadcasters who have established the terms of many current retransmission consent deals. For MVPDs now to complain about the very practice they insisted upon is outrageous.

D. Retransmission Consent Is Not Responsible for Increased Cable Costs

The Joint Cable Commenters ("JCC") submitted to the Commission a report by William P. Rogerson, Professor of Economics at Northwestern University, in which Professor Rogerson

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[26] *See, e.g.*, Sherman, *supra* note 22 ("In a nearly united front…cable operators refused to negotiate with the networks, making it a possibility that cable subscribers would be forced to rely on conventional television reception to tune in to top rated shows…"); Rachel W. Thompson, *TCI Cuts 14 'Zero Pay' Carriage Agreements*, MULTICHANNEL NEWS, June 21, 1993 ("Cablevision Systems announced last Friday that it would offer broadcasters a single free cable channel in each of the markets where it operates that they can use" and "a package of free advertising time…in exchange for retransmission consent"); Jeannine Aversa, *Effros: Offer Broadcasters Leased Access*, MULTICHANNEL NEWS, May 3, 1993, at 18 ("At least one cable executive has an idea of how to deal with failed retransmission consent negotiations: Offer the broadcaster a leased access channel on the cable system's basic tier and let the station collect a fee directly from subscribers."); Mark Robichaux, CABLE COWBOY: JOHN MALONE AND THE RISE OF THE MODERN CABLE BUSINESS (John Wiley & Sons, Inc. 2002) ("TCI, for one, refused to pay cash to any of the big networks but it indicated it might be willing to make room on its systems for a new cable channel a broadcaster might like to start.")

[27] *See, e.g., Inouye Poses Antitrust Question on Retransmission Consent Decisions*, COMMUNICATIONS DAILY, Aug. 11, 1993 ("14 of top-20 cable MSOs said they wouldn't pay cash for retransmission consent"). MSOs that stated they would not pay for retransmission consent included TCI, Continental, Cablevision Industries, Coaxial, Colony, Comcast Crown, Harron, Jones, KBLCom, Newhouse, TeleCable, Time Warner and Viacom. *Id*.

[28] *See supra* at pp. 3-4.

concludes that retransmission consent is responsible for the rapidly rising cost of basic cable service.[29] As explained in a report by Jeffrey A. Eisenach and Douglas A. Trueheart, attached as Exhibit B to these Reply Comments ("Eisenach/Trueheart Report"), Professor Rogerson's analysis is flawed.[30]

The Eisenach/Trueheart Report makes clear that programming costs alone do not drive increases in basic cable rates. Rather, programming costs are one factor among many that contribute to cable rate increases. As explained in the Eisenach/Trueheart Report, between 1996 and 2002, the cable industry spent over $75 billion on infrastructure and system upgrades. In 2004, cumulative capital expenditures by cable operators totaled over $80 billion. In comparison, programming costs in 2004 totaled $10.7 billion. The Eisenach/Trueheart Report further demonstrates that Professor Rogerson's conclusion that programming costs account for 42% of the rise in cable subscription rates is erroneous because Professor Rogerson's methodology is flawed. If Professor Rogerson's methodology is applied to determine the percentage of the increase in cable subscriber rates represented by costs other than programming, the increase in cable rates calculated using such methodology would be more than double the actual rise in cable rates.

Not only have non-programming costs played a more significant role in driving any purported increase in cable rates than programming costs, programming costs have remained relatively flat as a percentage of total costs.[31] To the extent programming costs have increased,

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[29] *See* Comments of Joint Cable Commenters, William P. Rogerson, Professor of Economics, Northwestern University, THE SOCIAL COST OF RETRANSMISSION CONSENT REGULATIONS (Feb. 28, 2005) ("ROGERSON REPORT").

[30] *See* Jeffrey A. Eisenach and Douglas A. Trueheart, RETRANSMISSION CONSENT AND CABLE TELEVISION PRICES (Mar. 31, 2005) ("EISENACH/TRUEHEART REPORT").

[31] *See id.*, at 16, Exhibit 9.

cable operators have been able to offset a portion of these costs through the sale of local advertising, a fact that the JCC ignores. As illustrated in the Eisenach/Trueheart Report, in the past five years, cable operators have seen an 87% increase in the amount of advertising revenue generated per subscriber. Ultimately, however, the cable interests want the best of both worlds, *i.e.* they want to pay less for programming that increases their advertising revenues. Such a result would be unwarranted, unreasonable, and unrealistic.

The Eisenach/Trueheart Report further demonstrates that when adjusted to account for improvements in service quality, cable rates are not, in fact, rising rapidly as Professor Rogerson contends. Professor Rogerson relies on data in the Commission's most recent annual report on competition in the MVPD market to reach his conclusion that programming costs are responsible for rising cable rates. Examining this data alone, however, is an insufficient means of analyzing the effect of retransmission consent on cable prices because it fails to account for costs associated with increases in the quality of service. The Eisenach/Trueheart Report analyzes cable costs per channel and shows that, over the last five years, the price of basic cable service on a per channel basis has risen at a rate of only 0.4%, much slower than the rate of inflation. The Eisenach/Trueheart Report also considers cable costs per hour viewed and finds that the adjusted price of basic cable per viewing hour decreased by almost 7% between 1999 and 2003. Thus, it is clear that, when improvements to the quality of cable service provided to customers are taken into account, cable prices are not increasing rapidly as Professor Rogerson claims.

E. Proposed Modifications to the Current Retransmission Consent Procedures Are Irrelevant and Unnecessary

In their comments, the cable interests propose several specific modifications to the current retransmission consent procedures. Among these are recommendations that Congress: (i) extend the conditions imposed in the News Corporation Limited ("News Corp.")/DirecTV

Holdings LLC ("DirecTV") transaction; and (ii) modify existing retransmission consent procedures to require that all retransmission consent disputes be submitted to mandatory arbitration.[32] As further set forth below, these proposed modifications are unnecessary and should not be adopted.

1. *The Commission Should Not Extend the Conditions Imposed in the News Corp./DirecTV Transaction Because the Rationale For Imposing Such Conditions Does Not Apply to Retransmission Consent Generally*

In approving the proposed merger between News Corp. and DirecTV, the Commission concluded that the transaction could create an incentive for the combined entity to withhold retransmission consent from other MVPDs.[33] To alleviate the potential for competitive harm, the Commission conditioned its approval on compliance with two primary conditions.[34] Several commenters argue that the Commission should recommend to Congress that it impose these conditions on all broadcasters.[35] There is no basis for such action because the principal reasons for imposing the News Corp./DirectTV conditions do not apply to broadcasters, as further set forth below.

[32] *See, e.g.,* Comments of EchoStar Satellite L.L.C, at 8-11, Comments of American Cable Association, at 11, Comments of BellSouth Corporation and BellSouth Entertainment, L.L.C., at 8.

[33] *See General Motors Corporation and Hughes Electronic Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124 (rel. Jan. 14, 2004) ("*News Corp./DirecTV Order*").

[34] Specifically, the Commission (1) required News Corp. to provide cable programming networks with non-discriminatory access to News Corp.'s owned and affiliated broadcast stations and (2) permitted MVPDs to submit retransmission consent disputes to arbitration. *Id.* at ¶ ¶ 218-226.

[35] *See, e.g.,* Comments of EchoStar Satellite L.L.C., at 8-11, Comments of American Cable Association, at 3 & 11.

First, the Commission's conclusions regarding the merger of News Corp. and DirecTV are not relevant to retransmission consent policies generally because, in reaching these conclusions, the Commission was concerned with the effect of the transaction on competition in the vertical broadcast-MVPD distribution market. Specifically, the Commission considered the potential for harm to non-affiliated MVPDs arising from the combination of a broadcaster, News Corp., and an MVPD, DirecTV, and found that, due to the vertical integration of these two types of entities, News Corp would have an increased ability to temporarily foreclose on provision of programming during retransmission consent negotiations given that it could direct defecting subscribers to DirecTV.[36] Such concerns generally are not present in retransmission consent negotiations involving broadcasters since most broadcasters (including Disney) are not affiliated with an MVPD.

Further, antitrust authorities subsequently decided not to employ these conditions in situations not involving vertical integration concerns, a fact ignored by commenters. Specifically, in the Federal Trade Commission's ("FTC") approval of the merger of NBC and Vivendi Universal Entertainment,[37] the FTC implicitly rejected arguments that the merger of a broadcast network and a content supplier may provide the combined entity with increased bargaining power in retransmission consent negotiations.[38] Since the transaction did not pose vertical integration concerns, competition would not be harmed because MVPDs would have multiple sources from which to secure programming. Accordingly, the Commission should

[36] *News Corp./DirecTV Order*, at ¶ 206.

[37] *See* Letter from Susan A. Creighton, Director, Federal Trade Commission, to Jean-Francois Dubos, General Counsel, Vivendi Universal S.A. (Apr. 20, 2004) (determining that further review of the proposed merger was unnecessary).

[38] *See* Jayne O'Donnell, *NBC, Vivendi Merger Hits Possible Snag*, USA TODAY, (Dec. 31, 2003), *available at* http://www.usatoday.com/money/media/2003-12-31-merger_x.htm.

follow this on-point precedent and reject the proposal to impose conditions on broadcasters absent a specific demonstration of such vertical integration concerns.

Second, the assertions by some commenters that the Commission determined in the *News Corp./DirecTV Order* that all broadcasters possess substantial market power to coerce acceptance of unfair retransmission consent agreements by MVPDs[39] is incorrect. Nowhere in the *News Corp./DirecTV Order* did the Commission find that broadcasters exercise market power at a level that is sufficient to harm competition. Although the Commission concluded that News Corp. possessed some market power in certain DMAs, the Commission did not reach any conclusions regarding the broadcast industry.[40] In fact, subsequently the Commission clarified that it was not passing upon the competitive balance of negotiating power that normally exists between broadcasters/programmers and MVPDs in the *News Corp./DirecTV Order*.[41]

Lastly, statements that broadcast-owned cable channels or networks are dominant forces in the market for MVPD programming are also incorrect.[42] As described in the Eisenach/Trueheart Report, broadcast-owned cable networks are far from dominant and

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[39] *See, e.g.*, ROGERSON REPORT, at 26 ("[T]he Commission's more general conclusion that broadcasters have market power with respect to their broadcast signals most certainly is relevant [to consideration of retransmission consent]."); Comments of EchoStar Satellite, L.L.C., at 5 ("To the extent there was any doubt about the market power of each major broadcasting network, the Commission has now definitively settled that question in the *News Corp.* decision"),.

[40] Nor did the Commission find that News Corp., absent the merger, enjoyed an unfair advantage over MVPDs in retransmission consent negotiations.

[41] *A La Carte Report*, at 70. Professor Rogerson ignores this statement in his attempt to refute arguments that the FCC's conclusions in the *News Corp./DirecTV Order* do not apply to retransmission consent broadly. *See* ROGERSON REPORT, at 26-27. In fact, in recent retransmission consent disputes, it has been said that "[c]able systems in bigger markets have more leverage because broadcasters have more money at stake." John M. Higgins and Bill McConnell, *No Cash, No Carry*, BROADCASTING & CABLE, Feb. 7, 2005, *available at* http://www.broadcastingcable.com.

[42] *See, e.g.*, Comments of Joint Cable Operators, at 6-28.

represent a small percentage of all cable networks, the overall number of which continues to increase.[43] Additionally, the Commission has acknowledged the diverse ownership of the most popular cable networks, thus indicating that broadcast-owned cable networks do not control programming in the MVPD market. In fact, the Eisenach/Trueheart Report points out that even Professor Rogerson's calculations regarding market share are more consistent with the FCC's findings of diversity than with dominance.[44]

2. *Other Suggested Modifications of Retransmission Consent Procedures Cannot Be Justified*

Several commenters also urge the Commission to recommend to Congress certain procedural changes, such as binding arbitration, to the existing retransmission consent regime.[45] These changes are not justified because there is no evidence indicating that the existing regime, which requires broadcasters to negotiate retransmission consent agreements in good faith and provides specific rules governing the retransmission consent complaint process, is ineffective.

The requirement that broadcasters negotiate in good faith was enacted by Congress in 1999 as a means to facilitate retransmission consent negotiations while still enabling the market to drive these negotiations.[46] In 2000, the Commission promulgated regulations to implement this provision, including regulations governing the process for filing retransmission consent complaints.[47] At that time, the Commission decided not to require arbitration because "[t]here

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[43] *See* EISENACH/TRUEHEART REPORT, at 12.

[44] *Id.* at 13.

[45] *See, e.g.,* Comments of EchoStar Satellite L.L.C, at 8-11, Comments of American Cable Association, at 11, Comments of BellSouth Corporation and BellSouth Entertainment, L.L.C., at 8.

[46] *See Good Faith Negotiation Order*, at 5448.

[47] *See id.*

has not been a sufficient demonstration that such a measure is necessary to implement the good faith provision of Section 325(b)(3)(C)."[48] Since then, no showing has been made to the Commission to establish the inadequacy or violations of the good faith negotiation rules that would warrant implementing binding arbitration.[49] Indeed, commenters are unable to cite a single case where the Commission actually sanctioned a broadcaster for violating its obligation to negotiate in good faith. In fact, the Commission has had only one opportunity to consider the issue and, in that case, determined that the broadcaster fulfilled its statutory obligation.[50]

Further, in enacting the Satellite Home Viewer Extension and Reauthorization Act, Congress extended the sunset date of the good faith negotiation requirement by five years and expanded the obligation to apply to all participants—MVPDs and broadcasters—in retransmission consent negotiations.[51] If Congress was concerned that the good faith negotiation provisions of the Act were ineffective, it would have implemented an alternative remedy, such as mandatory arbitration. For this and other reasons set forth above, there is no basis for modifying the existing retransmission consent regime.

[48] *Id*.

[49] Contrary to statements by several commenters, the *News Corp./DirecTV Order* does not provide a basis for implementing mandatory arbitration because, as discussed above, broadcasters generally are not affiliated with MVPDs.

[50] *See EchoStar Satellite Corp.*, 16 FCC Rcd at 15079. In this case, EchoStar brought a complaint against Young for allegedly violating the good faith negotiation requirement. The Commission applied a two-part test to determine whether such violation occurred. First, the Commission determined that Young did not violate the good faith negotiation requirement under an objective standard because Young did not refuse to (1) negotiate with EchoStar; (2) meet and negotiate in a reasonable time and manner, or (3) advance more than one unilateral proposal. Second, the Commission concluded that, considering the totality of the circumstances surrounding the dispute, Young negotiated in good faith. Thus, the Commission dismissed EchoStar's complaint.

[51] 47 U.S.C. § 325(C).

II. There Is No Need For the Government to Revise the Current Statutes or Regulations Governing Exclusivity

The network non-duplication and syndicated exclusivity rules (together, the "Exclusivity Rules") were promulgated decades ago to protect programming for which broadcasters had negotiated exclusive rights and, in turn, to protect advertising revenues generated by such programming. The purpose of the Exclusivity Rules is "to allow all participants in the marketplace to determine, based on their own best business judgment, what degree of programming exclusivity will best allow them to compete in the marketplace and most effectively serve their viewers."[52]

The Commission already has concluded that the absence of such rules directly harms the ability of broadcasters to compete against cable operators.[53] This conclusion remains true today because, as audience levels of broadcast stations continue to decline in the face of competition from MVPDs,[54] the Exclusivity Rules ensure that local broadcast audiences (and, thus, advertising revenues) do not further decline as a result of duplicate programming that is retransmitted in a local market in contravention of contractual arrangements between television stations, their networks and other program suppliers. Further, there is no evidence that the

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[52] *Amendment of Parts 73 and 76 of the Commission's Rules Relating to the Program Exclusivity in the Cable and Broadcasting Industries*, 3 FCC Rcd 5299, 5319 (1988) ("*Exclusivity Rules Order*").

[53] Specifically, in 1988, the Commission found that, in light of the growing number of cable operators, "the potential for duplicating broadcasters' programs, diverting broadcasters' audiences and advertising *as a result of an unbalanced regulatory regime* [(e.g. a regulatory scheme without exclusivity protection)] is far greater than we expected it to be when we rescinded our syndicated exclusivity rules." *See id.*, at 5305 (emphasis added).

[54] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Docket No. 04-227, FCC 05-13, ¶¶ 14, 77 (rel. Feb. 4, 2005) ("[B]roadcast television stations' audience shares have continued to fall as cable and DBS penetration, the number of cable channels, and the number of nonbroadcast networks continue to grow.").

Exclusivity Rules are ineffective. Indeed, the Exclusivity Rules, by enabling broadcasters to negotiate and enforce program exclusivity, contribute to the "operation of a fully competitive market" for program distribution.[55]

A. There Is No Reason To Alter the Negotiated Exclusivity Between Networks and Their Affiliates

In its 1988 order regarding the Exclusivity Rules, the Commission explicitly endorsed the network-affiliate system as an efficient means of program distribution and determined that "enforcement of reasonable exclusivity" was necessary to support distribution of network programming.[56] The Exclusivity Rules prevent MVPDs from retransmitting duplicate out-of-market network programming in a market where a network and its local affiliate have negotiated exclusivity. Such rules protect network advertising revenues, which the Commission has determined are "an essential underpinning of the network-affiliate relationship."[57] Thus, the Commission should not make any changes to its Exclusivity Rules because any changes that would allow MVPDs to import an out-of-market broadcaster's identical network programming into the local market without regards to negotiated exclusivity rights would jeopardize the continued vitality of the network system.

B. The Exclusivity Rules Enhance Localism

Commenters' proposed elimination of or modifications to the Exclusivity Rules also would harm localism and run contrary to Section 307(b) of the Act which requires the Commission to ensure that individual community interests are served.[58] The current Exclusivity

[55] *Exclusivity Rules Order*, at 5302.

[56] *Id.*, at 5318.

[57] *Id.*

[58] 47 U.S.C. § 307(b).

Rules promote the Commission's long-standing goal of localism by: (i) providing MVPD subscribers with access to local content produced by broadcasters; and (ii) giving broadcasters the audience levels they need in order to justify producing expensive local content. Specifically, without the Exclusivity Rules, MVPDs would be able to retransmit distant out-of-market programming into the local market without any consideration as to such station's programming actually serves the interests of the community into which it is retransmitted. At the same time, viewers would be diverted from the local broadcast station, thereby reducing the local broadcaster's advertising revenues. With less advertising revenue, a local broadcaster's ability to produce high quality locally oriented news and information services would be seriously impaired. Ultimately, elimination or modification of the Exclusivity Rules would jeopardize the viability of local television stations and their ability to serve their local community.

C. Suggested Revisions to the Exclusivity Rules Are A Back-Door Attempt To Repeal Retransmission Consent

As discussed above, the Exclusivity Rules effectively promote the Commission's goal of localism and support the network-affiliate system. Nonetheless, several commenters assert that the Exclusivity Rules should be eliminated under certain circumstances because they place MVPDs at a distinct disadvantage during retransmission consent negotiations.[59] Specifically, the National Cable and Telecommunications Association ("NCTA") and the American Cable Association ("ACA") request that the Exclusivity Rules be modified to prohibit broadcasters who elect retransmission consent from exercising their rights under the Exclusivity Rules.[60]

[59] *See, e.g.,* Comments of Joint Cable Commenters, at 14, Comments of the National Cable & Telecommunications Association, at 12.

[60] *See*, Comments of the National Cable & Telecommunications Association, at 12; American Cable Association, Petition for Rulemaking to Amend 47 C.F.R. § § 76.64, 76.93, and

Although these proposals are characterized as "modifications" to the existing rules, they seek to eliminate the Exclusivity Rules in their entirety for broadcasters electing retransmission consent, a result not proposed or contemplated by the Commission's public notice in this proceeding or otherwise warranted.[61]

Complaints about the Exclusivity Rules are a back-door attempt to repeal retransmission consent. The Exclusivity Rules do not unfairly enhance a broadcaster's position in retransmission consent negotiations. Rather, the Exclusivity Rules merely respect a network's contractual decision to distribute programming in a certain way. Further, the Exclusivity Rules, which were established prior to the enactment of retransmission consent, were taken into consideration in adopting the existing retransmission consent scheme, [62] which seeks to balance the relative negotiating positions of broadcasters and MVPDs.[63] The modifications suggested

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76.103: Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity (filed Mar. 2, 2005).

[61] In the public notice governing this proceeding, the Commission sought comment only on the impact of the Exclusivity Rules on competition in the MVPD market. The FCC did not seek comment on repeal of these rules. *See Media Bureau Seeks Comment For Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace*, Public Notice, MB Docket No. 05-28, DA 05-169 (rel. Jan. 25, 2005).

[62] Congress recognized the importance of the interplay between retransmission consent and the Exclusivity Rules in 1992 and concluded that modifications to the Exclusivity Rules "in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would . . . be inconsistent with the regulatory structure created in [the Act]." S. REP. NO. 102-92, at 38.

[63] *See News Corp./DirecTV Order*, at ¶ 180 ("Both programmer and MVPD benefit when carriage is arranged: the station benefits from carriage because its programming and advertising will likely reach more households when carried by MVPDs than otherwise, and the MVPDs benefit because the station's programming adds to the attraction of the MVPD subscription to consumers. Thus, the local television broadcaster and the MVPD negotiate in the context of a roughly even 'balance of terror' in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially damages each side greatly in their core business endeavor.")

by the cable interests, however, would upset this balance of power. If the Exclusivity Rules are modified as requested, broadcasters will have far less bargaining power in retransmission consent negotiations because, as the cable interests correctly state, an MVPD simply could contract to carry the signal of a non-local station instead of the local station. In sum, elimination of, or modifications to, the Exclusivity Rules would negate broadcasters' bargaining power while at the same time strengthening that of MVPDs and, ultimately, would render a broadcaster's retransmission consent rights meaningless.

III. CONCLUSION

As demonstrated in these Reply Comments and the attached exhibits, there is no need for the government to revise the current statutes or regulations regarding retransmission consent, network nonduplication, or syndicated exclusivity.

Respectfully Submitted,

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March 31, 2005

EXHIBIT A

EXHIBIT A

DECLARATION OF BEN PYNE

I am Senior Vice President of Affiliate Sales and Marketing for ABC Cable Networks Group. Among other responsibilities, I am responsible for working with the ABC owned television stations to negotiate retransmission agreements for the ten ABC owned television stations.

I attest that, in negotiating for retransmission consent, ABC offers MVPDs a cash stand-alone price for retransmission consent for the ABC owned stations. If the cable operator accepts that offer, that decision results in no additional obligation to carry any Disney/ABC programming. To the extent that any given MVPD decides not to accept ABC's stand-alone cash offer, and instead elects the alternative to negotiate to carry programming, that decision is made by the individual MVPD. We attempt to work with the MVPD to customize a reasonable offer to address their particular needs.

I hereby declare, under penalty of perjury, that, to the best of my knowledge, information, and belief, all of the factual information contained in this Declaration is accurate and complete.

Benjamin N. Pyne
Senior Vice President of Affiliate
Sales and Marketing
ABC Cable Networks Group

February 3, 2003

EXHIBIT B

CAP ANALYSIS

RETRANSMISSION CONSENT AND CABLE TELEVISION PRICES

March 31, 2005

Jeffrey A. Eisenach
Executive Vice Chairman

Douglas A. Trueheart
Senior Vice President

Note: Support for this study was provided by The Walt Disney Company. The views expressed are those of the authors. CapAnalysis is an economic and financial consulting firm located in Washington, DC. For more information, visit www.capanalysis.com.

Contents

List Of Exhibits

I. INTRODUCTION

We have been asked by The Walt Disney Company to evaluate a report by William P. Rogerson that was submitted to the Federal Communications Commission (FCC or Commission) by the Joint Cable Commenters (JCC) as part of the Commission's *Inquiry on Rules Affecting Competition in the Television Marketplace.*[1] Professor Rogerson and JCC argue that retransmission consent "has been a major contributing factor to the size and price of the expanded basic tier."[2] Specifically, Professor Rogerson concludes that,

> [S]ince the passage of retransmission consent, the Big Four broadcasters have grown to dominate the MVPD network programming industry. Subscription prices for cable TV have risen significantly over the past decade, and there is wide agreement that increases in programming costs have been an important factor fueling these price rises. .... [T]he passage of retransmission consent regulations likely played a major role in contributing to these increases in programming costs by allowing broadcasters to exercise their market power over their broadcast signals.[3]

We examine these issues and conclude that: (a) cable prices are not rising rapidly, especially when adjusted to reflect changes in quality; (b) programming costs account for a very small proportion of recent cost increases experienced by cable operators, the bulk of which are associated with their investments in new digital infrastructure and services such as broadband and telephony; (c) retransmission consent does not harm competition or consumers, but instead contributes to consumer welfare in the markets for broadcast/MVPD programming and distribution.

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[1] William P. Rogerson, "The Social Cost of Retransmission Consent Regulations," (February 28, 2005) (submitted as Attachment A to Comments of Joint Cable Commenters, MB Docket No. 05-28, March 1, 2005). Hereafter, "Social Cost" and "JCC Comments," respectively.

[2] JCC Comments at 5.

[3] Social Cost at 19.

In Section II of this report, we examine the relationship between programming costs and cable rates. Section III focuses on the competitive effects of retransmission consent. Section IV presents a brief summary.

II. PROGRAMMING COSTS ARE NOT DRIVING INCREASES IN CABLE RATES

Professor Rogerson argues that "cable subscription prices have been rising at a very fast rate since passage of the Telecommunications Act in 1996,"[4] and that "there is wide agreement that increases in programming costs have been an important factor fueling these price rises."[5] Retransmission consent is responsible, he says, because it allows broadcasters to "negotiate some combination of higher license fees and increased carriage than they otherwise would have been able to negotiate."[6]

We examined the determinants of cable rates in some detail in a 2003 study.[7] We concluded then that,

> ...cable rates, properly understood, are not rising faster than the rate of inflation – indeed, in real terms they are falling. Moreover, programming costs represent only a small fraction of the overall cost increases experienced by cable TV operators in recent years, and clearly are not the primary driver of retail rates.[8]

In this section, we review the most recent data, and conclude that cable rates, properly understood, are still not rising faster than inflation, and programming costs are still not the primary driver of cable cost structures.

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[4] Social Cost at 17.
[5] Social Cost at 19.
[6] Social Cost at 37.
[7] Jeffrey A. Eisenach and Douglas A. Trueheart, *Rising Cable TV Rates: Are Programming Costs the Villain,* CapAnalysis, LLC (October 23, 2003). Hereafter "2003 Report."
[8] 2003 Report at 1.

A. Quality Adjusted Cable Rates Are Not Rising Rapidly

Each year, the Commission surveys a random sample of cable operators and publishes a report on changes in cable industry prices.[9] The survey provides a basis for estimating prices paid by subscribers for basic and expanded basic (hereafter collectively referred to as "basic") programming services.

At the time of our 2003 report, the data showed that monthly basic subscription rates had risen by 8.2% during in the preceding period (July 2001-July 2002), much faster than the consumer price index, which rose by 1.5%. We argued then, however, that monthly subscription prices fail to take into account changes in quality, such as the number of channels of programming. We showed then that when such factors were taken into account, cable television prices were level or actually falling in real terms. The same results hold today.

The Commission's most recent survey indicates that basic rates increased by 5.4% between January 1, 2003 and January 1, 2004, a period during which consumer prices as a whole, as measured by the rise in the consumer price index, rose 1.1%. Furthermore, over the five-year period ending January 1, 2004 basic cable rates rose at an annual rate of 7.5% compared with 2.1% for the consumer price index. In other words, just as in 2003, the survey seems on its face to suggest that basic cable rates are rising faster than inflation.

As we noted in 2003, however, this data "fails to take into account improvements in product quality, most notably a substantial increase in the number of channels offered

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[9] See Federal Communications Commission, *Report on Cable TV Prices*, MM Docket No. 92-266 (February 4, 2005) (hereafter "Cable Price Report"). (The most recent report moved the reporting period from July-July to January-January.)

as part of basic cable programming packages."[10] Cable subscribers place a high value on programming variety and diversity, as evidenced, for example, by the fact that these product attributes have played a key role in the highly successful efforts of DBS providers to win customers away from cable operators.[11] Thus, it is appropriate to adjust cable subscription prices to reflect changes in the number of channels carried, i.e., to measure cable prices by the cost per channel.

The FCC agrees this is an appropriate basis by which to measure cable rates, and in fact does so in its report. Between January 1, 2003 and January 1, 2004, the Commission reports, the average number of channels carried on the basic tier increased from 67.5 to 70.3. As reflected in Exhibit One below, adjusting the increase in subscription rates to reflect this growth in channels shows that the rate per channel rose by only 1.1% during 2003, and only 0.4% annually over the past five years. Thus, on a per channel basis, over the past five years rates have risen more slowly than inflation.

Exhibit One:
Changes in Cable TV Rates, 1999-2004

	Increase in Average Monthly Rates	Increase in Average Monthly Rate Per Channel	Consumer Price Index
Jan. 2003 to Jan. 2004	5.4%	1.1%	1.1%
5-year average (Jan. 1999 to Jan. 2004)	7.5%	0.4%	2.1%

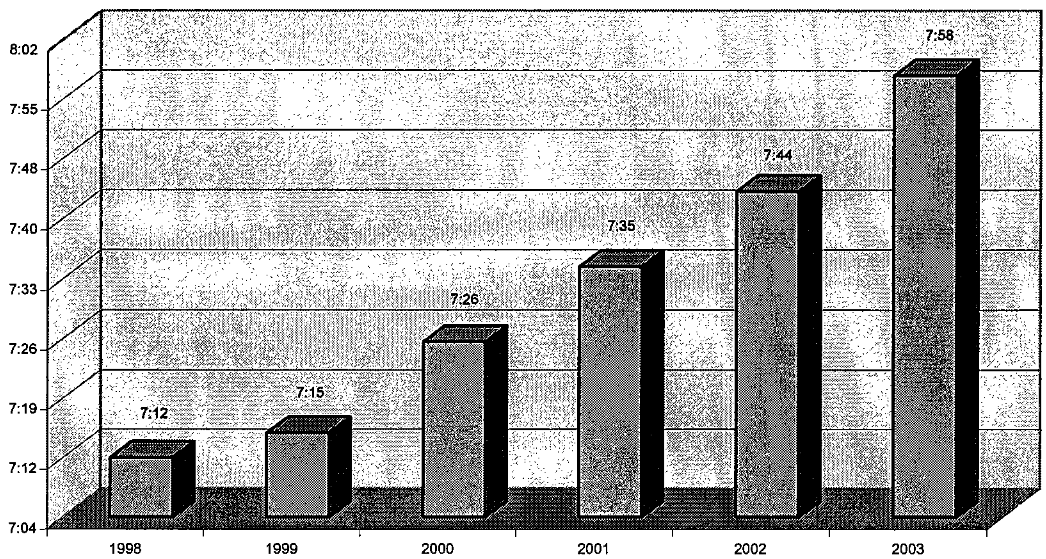
Source: Cable Price Report at 9.

[10] 2003 Report at 4.

[11] See, e.g., the first item on the list of competitive advantages listed by DirecTV on its web page: "The DIRECTV® TOTAL CHOICE® package gives you over 125 digital channels for $41.99/mo, including your local channels. For the same price with cable, you'll typically get 60-90 analog channels." (www.directv.com/DTVAPP/get_directv/directv_vs_cable.dsp, viewed March 28, 2005).

Professor Rogerson suggests that the additional channels being carried on cable networks are of little or no value to consumers.[12] Yet there are numerous indicators that consumers value the increasing quality and diversity of cable TV programming. For example, as shown in Exhibit Two below, the actual viewing time of cable TV households increased by 46 minutes, or more than 10%, between 1998 and 2003. And, as shown in Exhibit Three, cable's share of that time increased as well, from only 50% in 1998 to 60% in 2003.

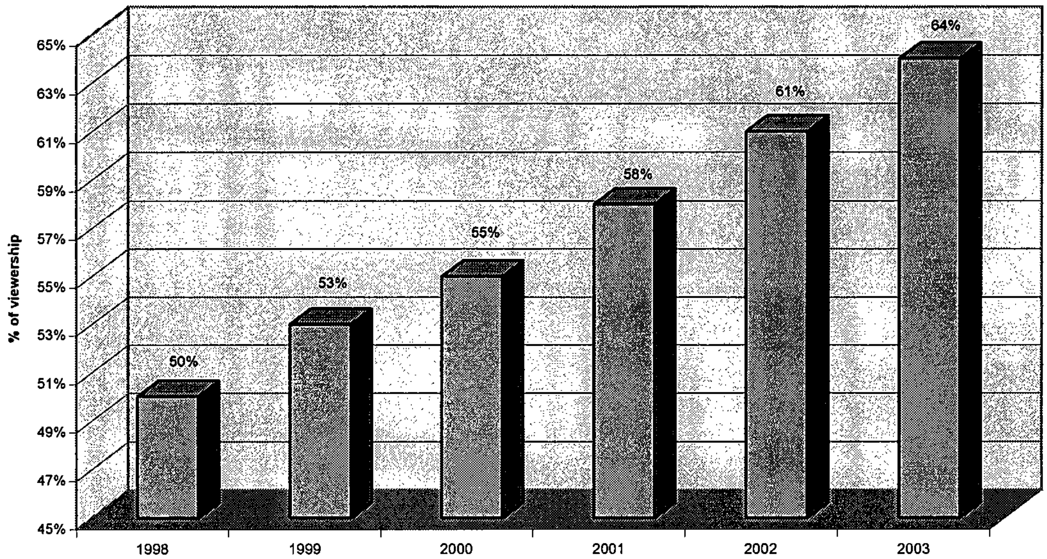
EXHIBIT TWO:
TV Viewing per Household (in hours)



Sources: Kagan Media Trends 2002 (pg. 251); 2002 and 2003 calculated based on growth data from "Veronis Suhler Stevenson Communications Industry Forecast & Report," 2004.

[12] See Social Cost at 4 (arguing that cable operators are forced to "purchase additional programming that they might otherwise not have purchased" and "Consumers also are harmed because these tie-ins...distort the selection of programs that is available to MVPD subscribers.")

EXHIBIT THREE:
Cable Share in Cable TV Households

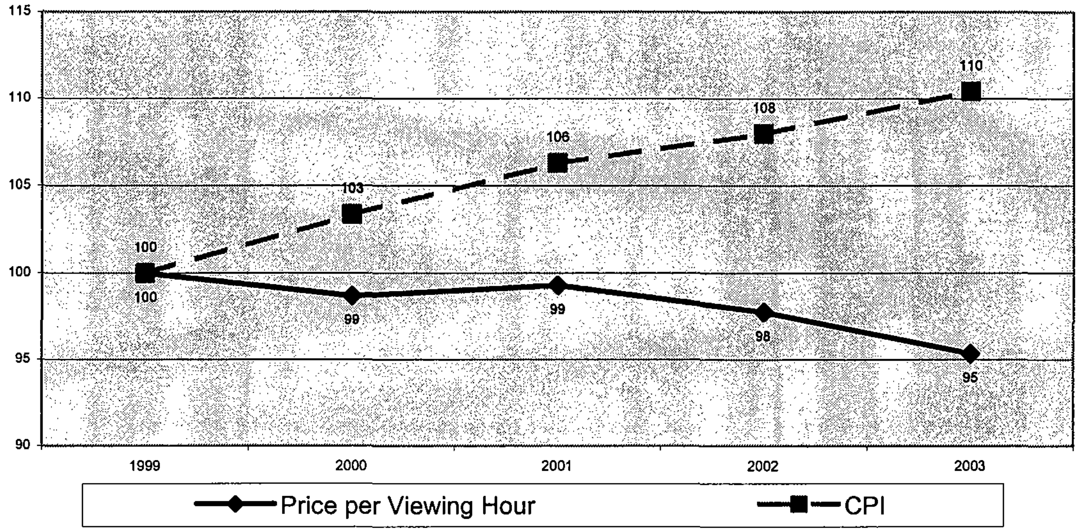


SOURCE: Kagan Economics of Basic Cable Networks 2005 (pg. 46)

Using this above data, we can calculate what is perhaps the most valid measure of the value received by cable subscribers: cost per hour viewed. As reflected in Exhibit Four, the nominal price per hour viewed for cable subscribers decreased at an average annual rate of 1% from 1999 through 2003, while the consumer price index increased at an average annual rate of 2.1% over the same period. Thus, the inflation adjusted price per viewing hour actually decreased by 6.8% during the period.[13]

[13] The conclusion that inflation adjusted price per viewing hour is actually decreasing is also supported by a study by Professor Steven Wildman sponsored by the NCTA. Professor Wildman concluded that the inflation adjusted price per viewing hour decreased by more than 15 percent over the ten-year period from 1993 through 2003. See Steven Wildman, "Assessing Quality-Adjusted Changes in the Real Price of Basic Cable Service" (September 10, 2003; attachment to NCTA Comments in MB Docket 03-172.)

EXHIBIT FOUR:
Cable Television Price per Viewing Hour vs. CPI, 1999-2003
(Index: 1999 = 100)



The increase in TV viewing cited above also suggests that subscribers feel that the quality of the programming being provided has also increased, as evidenced by the fact that the number of prime time Emmys received by cable companies increased by 254% from 1992 through 2003.[14] This increasing quality is not free. As indicated in Exhibit Five below, programming expenditures by the national cable program networks increased at an average annual rate of 14% from 1999 through 2005, much faster average annual increase in cable rates charged to basic subscribers found by the FCC for the same period. [15]

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[14] Social Cost at 58.

[15] The increase in programming costs also reflects increased capital expenditures and operating costs associated with producing digital and high definition content. While these costs are difficult to quantify, in part due to the fact that they have been incurred in large part by independent, privately-held production companies, they are certainly significant.

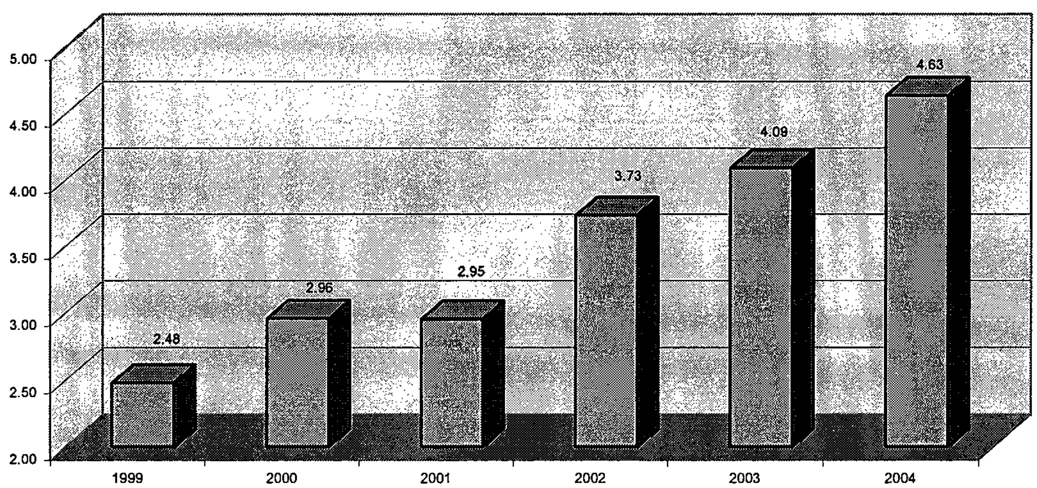
EXHIBIT FIVE:
Programming Expenditures of MVPD Networks

Year	Millions of $	Annual % Change
1999	$6,445	18.0%
2000	$7,265	12.7%
2001	$8,024	10.4%
2002	$9,072	13.1%
2003	$10,413	14.8%
2004	$11,559	11.0%
2005[est.]	$12,862	11.3%

Source: Kagan, "Broadband Cable Financial Databook," 2004.

It should also be noted that that the increase in the quality of programming and the corresponding increase in viewership have resulted in a direct benefit to the cable operators: an increase in advertising revenues. As indicated in Exhibit Six below, on a per subscriber basis net advertising revenue to the cable operators increased by 13% from 2003 to 2004 and by 87% from 1999 through 2004. At least a portion of this increase should be used to offset the costs of programming.

EXHIBIT SIX:
Monthly Cable Operator Advertising Revenues per Subscriber
1999-2004



Source: 2004 Kagan

B. Programming Costs Are Not Driving Cable Cost Increases

Professor Rogerson argues it is "well recognized" that "cable operators' costs of purchasing programming have also been rising at a very rapid rate and that a substantial share of the price increases that consumers have experienced simply reflects a pass-through of these cost increases."[16] In support of this proposition, he cites a March 2004 report by the General Accounting Office,[17] and a 2003 rebuttal, by Rogerson himself, of our October 2003 report.[18] His interpretation of the GAO report is misleading, and his 2003 report is simply incorrect.

Rogerson quotes one paragraph from the 21-page GAO report, which concludes that programming costs are "one important factor contributing to higher cable rates."[19] But GAO also found that "a variety of factors contribute to cable rate increases,"[20] that "the cable industry has spent over $75 billion between 1996 and 2002 to upgrade its infrastructure," and that "investments in system upgrades contributed to increases in consumer cable rates."[21] Perhaps most importantly, the GAO report found that "competition among networks to produce and show content that will attract viewers has become more intense," "bid up the cost of key inputs," "sparked more investment in

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[16] Social Cost at 18.

[17] "Subscriber Rates and Competition in the Cable Television Industry," *Statement of Mark L. Goldstein, Director, Physical Infrastructure Issues, U.S. General Accounting Office, Before the Committee on Commerce, Science and Transportation, U.S. Senate*, (March 25, 2004). (Hereafter "GAO 2004.") (The GAO's name has since been changed to the "Government Accountability Office.")

[18] William P. Rogerson, Correcting the Errors in the ESPN/CapAnalysis Study on Programming Cost Increases (November 11, 2003). (Hereafter, Rogerson 2003.) Rogerson's rebuttal was commissioned by Cox Communications at a time when Cox seeking to justify *a la carte* regulation of cable programming on the grounds that cable rates were rising and that programming costs (specifically, ESPN's license fees) were to blame. See below for a discussion of Cox's "revised and extended" views on this issue.

[19] GAO 2004 at 3.

[20] GAO 2004 at 9.

[21] GAO 2004 at 11.

programming," and "improve[ed] the quality of programming generally."[22] All of these findings are consistent with our analysis above, and explain why any meaningful analysis of cable rates and programming costs must take into account changes in the quality and quantity of programming being offered to cable subscribers.

Rogerson's second citation for the proposition that programming costs are responsible for rising cable rates is his own report. Based on our 2003 empirical analysis of MVPD cost structures, he calculated that net programming costs (after a partial correction to reflect the value of increasing advertising revenues) had risen by $2.96 per subscriber between 1999 and 2002, and then compared that figure with the increase in basic cable rates of $7.06 over that period of time. His conclusion, which he repeats in his new report, is that "42% [$2.96/$7.06] of the actual rise in subscription prices for cable TV can be explained by the rise in programming costs in the sense that this is the amount prices would have had to rise in order for cable systems to recover their increased programming costs."[23]

This conclusion is nonsense, as can been seen by applying Rogerson's methodology to the rest of the cost picture (which we presented as part of the same analysis from which Rogerson drew his $2.96 figure).[24] When we look at other costs, we see that "Capital Expense" rose by $5.05 between 1999 and 2002, while "Other Operating Expense" rose by $7.33. If we applied Rogerson's methodology to these figures (i.e., divide each by the $7.06 increase in monthly cable rates) we would conclude that Capital Expenses "explain" 72% ($5.05/$7.06) of the "actual rise in

[22] GAO 2004 at 10.
[23] Rogerson 2003 at 7.
[24] See 2003 Report at 12, Figure 5.

subscription prices," while Other Operating Expenses "explain" 104% ($7.33/$7.06). The three factors taken together, in other words, "explain" 218% (42% + 72% + 104%) of the rise in cable prices.

Our 2003 conclusion – that programming costs accounted for only about 22% of the increase in cable costs between 1999 and 2002 – was based on a detailed examination of cable system expenses over that period of time. We found then that the increases in capital spending and non-programming operating costs associated with the cable operators' decision to upgrade their networks to provide digital television, Internet access, telephony and other services, were a "far more significant source of cost increases than programming."[25] We also noted that the advanced broadband, telephony and HDTV services made possible by the cable operators' investments "have not yet been fully realized; and thus despite the fact that they are not yet benefiting from the increased costs of the new technologies, basic cable subscribers are bearing the costs of these upgrades."[26]

Now, nearly three years later, the transition from analog to digital is largely complete. As shown in Exhibit Seven below, cumulative capital expenditures now total over $80 billion (about $1,250 per subscriber), but as of 2004, 97% of cable subscribers were served by systems offering digital programming, 95% by systems offering cable internet access and 29% by systems offering telephony.[27]

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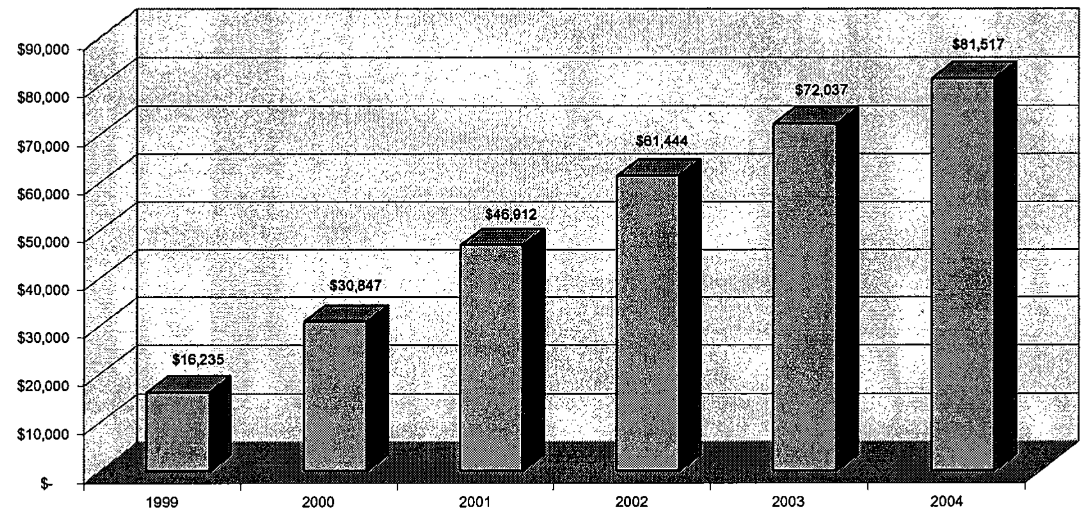
[25] 2003 Report at 17. Our findings were largely in accord with those of a May 2003 NCTA White Paper. See National Cable & Telecommunications Association, "Cable Pricing, Value and Costs," NCTA White Paper (May 2003).
[26] 2003 Report at 17.
[27] Cable Price Report at ¶37, Table 10.

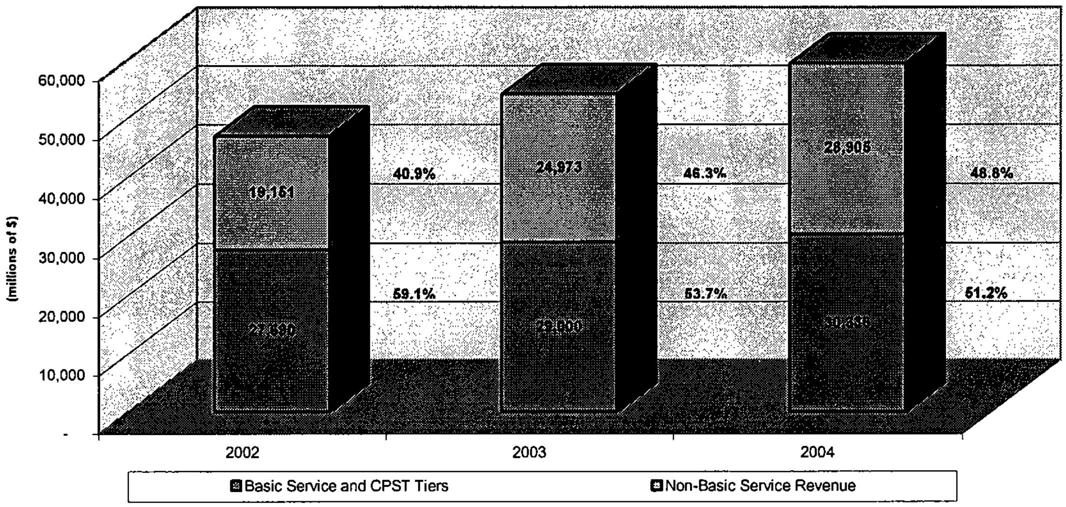
EXHIBIT SEVEN:
Cumulative Investment in Plant by Cable Operators
1999-2004 ($ million)



SOURCE: Kagan World Media, " Broadband Cable Financial Databook 2004

Not surprisingly, as illustrated in Exhibit Eight below, revenue from advanced services has grown at a far more rapid rate than revenue from basic service, growing by 51% from $19.1 billion in 2002 to $28.9 billion in 2004, compared with growth in basic service revenue of only 9.6% over the same period. Non-basic revenue represented just over 40% of total revenue in 2002, but had grown to nearly 49% in 2004.

EXHIBIT EIGHT:
Revenue from Basic Cable vs. Other Revenues, 2002-2004



SOURCE: Kagan, "Broadband Cable Financial Databook," 2004.

The rising revenue share accounted for by advanced services raises important methodological issues with respect to the correct allocation of costs, however. As the Commission recognizes in its Cable Price Report,

> The nature of cable service has changed significantly in recent years with the emergence of digital cable, Internet access, and telephony as important new services so that these new services now represent significant sources of cable system revenues and costs. A substantial portion of these costs are incurred to support all system services jointly and, therefore, cannot be attributed directly to basic and expanded basic cable services.[28]

Thus, "there is no uniform way to allocate these joint costs to specific lines of business or service"; and, "to provide a complete picture, it would be necessary to take into account revenue changes that might offset increases in costs."[29]

We agree that cable operators' changing revenue structures now make it practically impossible to accurately allocate costs across different services, and we

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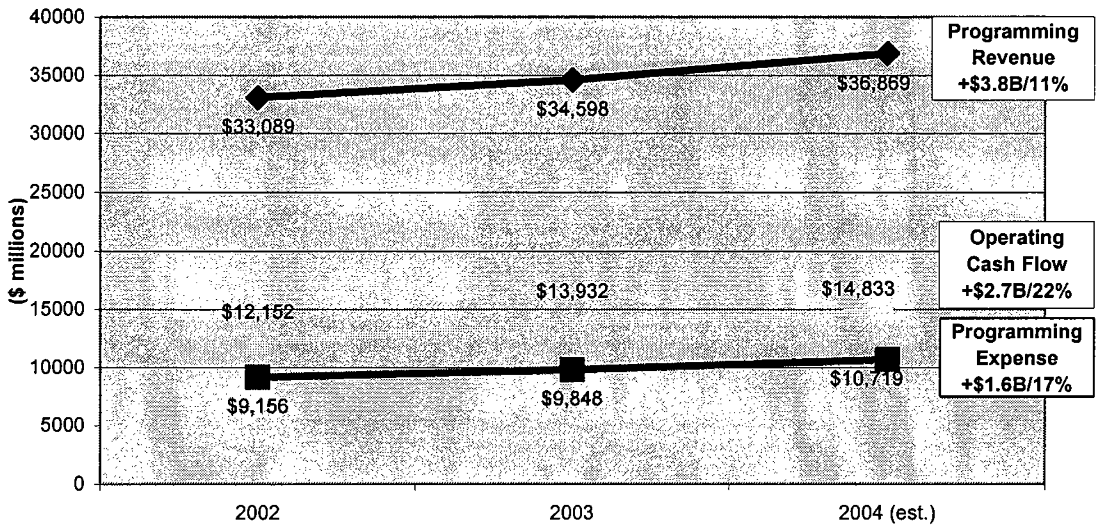
28 Cable Price Report at 10.
29 Cable Price Report at 10.

therefore do not attempt to update our 2003 estimates.[30] In Exhibit Nine, we show total cable programming costs, programming revenues and overall operating profits for the seven largest cable operators for 2002-2004. While programming costs rose by $1.6 billion, both revenues (+$3.8 billion) and operating profits (+$2.7 billion) rose by much more; and, programming costs represent less than 30% of revenues throughout the period.[31] These figures show that our 2003 conclusion, that programming costs "are not a primary driver of retail rates," remains valid today.

EXHIBIT NINE:
Programming Revenue, Programming Expense and Operating Cash Flow
Major Cable Operators, 2002-2004



SOURCE: Morgan Stanley Equity Research Report, "Bundling and the Battle for Basic," October 12, 2004.

30 We believe, however, that our 2003 results are still broadly representative of the relationships between programming costs and other costs for basic cable service – i.e., that programming represents a relatively small fraction of total costs.

31 Two caveats: First, these figures represent total programming cost, much of which is associated with programming not owned by broadcasters and thus not affected by retransmission consent. Second, the reader who may be tempted to divide $1.6 billion by $3.8 billion and conclude that "42% of the actual rise in subscription [revenues] for cable TV can be explained by the rise in programming costs in the sense that this is the amount [revenues] would have had to rise in order for cable systems to recover their increased programming costs," should first see the discussion at 10-11 above.

To summarize: (a) cable prices, properly adjusted to reflect changes in the quantity and quality of programming, are not rising faster than inflation and, (b) programming costs are not primarily responsible for even the nominal increases in cable prices that have taken place since 2002.

III. RETRANSMISSION CONSENT DOES NOT HARM COMPETITION OR CONSUMERS

Professor Rogerson and JCC assert retransmission consent imposes costs on consumers by enhancing the "dominance of the major broadcast networks,"[32] who leverage their market power by bundling their "must have" local broadcast channels with MVPD network programming to "force MVPDs to (1) pay higher prices for program networks that they might have purchased in any event and (2) purchase additional program networks that they would not otherwise have purchased."[33] Moreover, and "most importantly," according to Rogerson, "this will likely damage competition by either preventing the entry of competitors or at least weakening them,"[34] which "may be one of the primary motives for bundling in the first place."[35] Moreover, he argues at length, the Commission has already endorsed this view in its Fox/DirecTV.

As we explain in detail below, each and every aspect of this argument is faulty, either factually, analytically or both. Broadcasters are by no meaningful measure "dominant" in MVPD programming. They do not "force" MVPDs to carry additional networks, but instead offer the alternative of payment for broadcast channels on a stand-alone basis. They do not have "market power" in the sense of being able to force

[32] Social Cost at 10.
[33] Social Cost at 50.
[34] Social Cost at 51.

anticompetitive or supracompetitive prices or terms on MVPDs; rather, to the extent bundling takes place, it is motivated by efficiency concerns. And, as the Commission has pointed out previously, its findings in Fox/DirecTV unequivocally *do not* support the findings being urged upon it by Professor Rogerson and the JCC.

A. Network Broadcasters Are Not "Dominant" in the Market for MVPD Programming

Professor Rogerson claims that "The four major broadcast networks are now collectively the predominant suppliers of satellite-delivered networks."[36] But in fact, broadcaster MVPD owned-networks are far from dominant in any meaningful sense of the word.

According to the FCC's most recent report on competition in the MVPD sector, the 89 broadcast-owned cable networks "represent 23 percent of the 388 total networks identified, and 30 percent of the 299 networks that are unaffiliated with a cable operator."[37] Moreover, the Commission found, the number of new networks is growing: "Since our last *Report*, the total number of national networks has increased. In 2004, we identified 388 satellite-delivered national programming networks, an increase of 49 networks over the 2003 total of 339 networks. Of the 388, 89 networks (23 percent) were vertically-integrated with at least one cable operator in 2004. Last year, 110 networks were vertically integrated (33 percent) of the 339 total."[38]

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[35] Social Cost at 51.
[36] Social Cost at 17.
[37] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report* (MB Docket No. 04-227, February 4, 2005), at ¶148. (Hereafter MVPD Report.)
[38] MVPD Report at ¶145

As a result, the Commission concluded, "[I]t appears there is diverse ownership of the most popular networks: 10 different entities own all or part of the top 20 programming networks in terms of subscribership."[39]

Even the statistics presented by Professor Rogerson do not support his argument. According to his calculations, no entity owns more than 21 percent of MVPD programming networks; the four major broadcast networks taken together own only 56.5 percent;[40] six cable MSOs own 25.9 percent; and, unaffiliated programmers own 17.6 percent. These figures are far more consistent with the Commission's findings of of diverse and unconcentrated ownership than with Rogerson's assertion of "dominance." Indeed, we used Professor Rogerson's market share statistics for 2004 to calculate a Herfindahl-Hirschman Index (HHI) of 1219,[41] which lies at the bottom end of the "moderately concentrated" range, and is not significantly different from the 1097 HHI figure the FCC estimates for MVPD distributors.[42] In other words, even using Professor Rogerson's figures, the MVPD programming industry and the MVPD distribution business are approximately equally "concentrated."[43]

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[39] MVPD Report at ¶150.

[40] It should be noted that we do not endorse Professor Rogerson's methodology for calculating market shares. He attributes partial ownership to total market shares – e.g., if a broadcast company owns 10% of a cable network, then 10% of that cable network's revenues are attributed to the broadcast company (see Social Costs, n.3). There is no reason to believe, however, that a 10% share accords the owner of the network sufficient control (or even influence) to affect strategic behavior. The Commission takes a different approach to calculating shares. See MVPD Report at ¶144, n. 648.

[41] We relied on the figures in Rogerson's Table 2, p. 8, leaving out the 13 percent total market share attributed to "Others." Since the individual shares of each of the "others" are small, this omission will have no significant impact on the HHI calculation.

[42] MVPD Report at ¶144.

[43] This is true, of course, only at the national level. At the level of local markets, the distribution business typically is comprised of only three competitors – cable and the two satellite MVPDs – with HHIs in excess of 3000 (i.e., well above the DOJ Guidelines threshold of 1,800 for a "highly concentrated" industry). The FCC classifies only 3.7 percent of downstream MVPD markets as "competitive." MVPD Report at ¶136.

These structural characteristics of the MVPD marketplace imply that broadcasters should not be able to negotiate higher license fees from MVPD networks than other MVPD programmers. Not surprisingly, this is precisely what the General Accounting Office concluded when it conducted an econometric study of this precise issue in 2003.[44] That study found that "ownership affiliations – with broadcasters or cable operators – had no influence on cable networks' license fees."[45]

B. The Commission's Fox-DirecTV Analysis Does Not Support Professor Rogerson or the JCC's Position

Professor Rogerson's next argument is founded on his insistent misinterpretation of the Commission's findings in the Fox/DirectTV order. There, Rogerson says, the Commission found that there are not close substitutes for local broadcast content, and that News Corp. therefore had some bargaining power in its negotiations with MSOs.[46] Professor Rogerson makes much of this finding, which he insists supports his conclusion that broadcasters are able to use retransmission consent to raise prices and/or force un-economic contractual provisions on MSOs.

In fact, the Commission has repeatedly found precisely the opposite to be true. In a passage from the Fox/DirecTV order that appears just a few pages prior to the passages cited by Professor Rogerson, the Commission found that:

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[44] General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry* (GAO-04-8, October 2003). (Hereafter "GAO 2003.")

[45] GAO 2003 at 29. Professor Rogerson attempts to explain away this result in a lengthy footnote, but offers no substantiation for any of his speculative criticisms. Rogerson also points out that the GAO study finds evidence that program networks offered by broadcasters are more likely to be carried by MVPDs than unaffiliated program networks, a fact he says is consistent with his contention that broadcasters use retransmission to get cable operators to carry their networks. Rogerson neglects to mention, however, that the GAO study finds that *programming networks affiliated with cable operators* are also more likely to be carried than unaffiliated networks. This result may be explained as easily by efficiency concerns as by market power – i.e., it may be that both broadcasters and cable operators enjoy economies of scope or other cost advantages that make them more efficient producers and/wholesalers of cable programming.

[46] Social Cost at 24-27 citing Fox/DirecTV order at ¶¶201, 202, 203.

> Both programmer and MVPD benefit when carriage is arranged: the station benefits from carriage because its programming and advertising will likely reach more households when carried by MVPDs than otherwise, and the MVPDs benefit because the station's programming adds to the attraction of the MVPD subscription to consumers. Thus, the ***local television broadcaster and the MVPD negotiate in the context of a roughly even 'balance of terror'*** in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially damages each side greatly in their core business endeavor.[47]

As clear as this language would seem to be, it did not prevent commenters in the Commission's recent *a la carte* proceeding from attempting to take out of context some of the same language relied upon by Professor Rogerson. Thus, the Commission took pains in its report to Congress to clarify its finding:

> All differentiated products, such as video programming, possess some degree of market power in the sense that there are no perfect substitutes. The critical question in any analysis involving differentiated products is whether the existing degree of market power is sufficient to allow the firm to profitably engage in the hypothesized anticompetitive activity.... ***Thus, nothing in the analysis of the News Corp./DirecTV transaction should be read to suggest that the Commission has concluded that the market power of broadcasters is sufficient to lead to competitive harms in the absence of vertical integration.***[48]

In view of this extremely clear statement, there is simply no justification for Professor Rogerson's insistence that "the Commission's conclusion that broadcasters have market power ... implies that retransmission consent allows broadcasters to

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[47] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee for Authority to Transfer Control, Memorandum Opinion and Order* (MB Docket No. 03-124, January 14, 2004), at ¶180. (emphasis added). See also ¶75 ("We agree with the Applicants that the instant transaction does not present horizontal concentration issues. The Commission has previously held that broadcast television is not sufficiently substitutable with the services provided by MVPDs to constrain attempted MVPD price increases, and hence, is not in the same relevant product market.") (Hereafter "Fox/DirecTV Order.")

[48] *Report on the Packaging and Sale of Video Programming Services to the Public* (November 18, 2004), p. 70 (emphasis added). (Hereafter "A La Carte Report.") This language appears in the same paragraph as several sentences cited by Professor Rogerson.

negotiate significant compensation from MVPDs ... [and] means that retransmission consent regulations create a significant social cost."[49]

Nearly as remarkable as Professor Rogerson's persistence is the irony inherent in JCC's attempt to argue that the Fox/DirecTV order has implications for this proceeding, when these same filers (plus Cable One) went out of their way in that proceeding to insist that the issues there were "unique," "singular" and unrelated to any "rulemaking proceeding." "The issues raised by the Joint Cable Commenters are transaction specific," they said.

> The fact that [retransmission negotiation] issues may touch upon generic concerns regarding retransmission consent and sports programming costs is of no moment, since ***it is the DirecTV acquisition itself that increases News Corp's incentive and ability to wield undue pricing power and bargaining leverage*** in connection with its broadcast stations and RSNs....
>
> Moreover, in this instance there [*sic*] no rulemaking proceeding that addresses the issues raised by the Joint Cable Commenters. Indeed, no other entity has ever owned and operated the unique combination of broadcast network, local stations, cable programming, and multichannel distribution assets involved in this transaction. ***It is the very singularity of the asset combination involved here that triggers the competitive and consumer harms raised by the Joint Cable Commenters*** and others in connection with this transaction."[50]

In fact, JCC said then, in the absence of the merger, News Corp. would be constrained by uncertainty if it tried to exercise market power in retransmission negotiations:

> Prior to acquiring a controlling interest in DirecTV, News Corp. faces some risk and uncertainty [in retransmission consent negotiations]. It does not know whether the loss of subscription and advertising revenue from a service interruption arising from a temporary bargaining impasse with a cable operator over carriage of RSN or FOX programming could be made

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[49] Social Cost at 26.

[50] Letter from Bruce D. Sokler to Marlene H. Dortch, *Notice of Ex Parte Participation in MB Docket No. 03-124* (August 4, 2003), at 11-12. (The "Joint Cable Commenters" in that proceeding were the same as here, except that Cable One was also among the commenters in the earlier proceeding.)

up via higher carriage fees gained from that distributor (and others in adjacent markets) once the impasse is resolved.[51]

In other words, in the absence of vertical integration, broadcasters cannot know whether they have an upper hand in the negotiations or not.

Finally in this context, we note that if their investigation of Fox/DirecTV had caused antitrust authorities to have concerns about joint ownership of broadcast and MVPD programming properties, they had ample opportunity to act on those concerns in the Spring of 2004, when they reviewed the merger of broadcaster GE/NBC with the cable and other entertainment properties of Vivendi's Universal Entertainment Group. But, despite the fact that concerns about the impact of the merger on retransmission negotiations were explicitly raised, the deal cleared antitrust reviews in both the European Union and the United States without any conditions being imposed. Final approval was granted in April 2004, just four months after the FCC's order in Fox/DirecTV.[52]

C. Anecdotal Evidence that Broadcasters and MVPDs Sometimes Fail to Reach Agreement Does Not Imply Broadcasters Have Market Power

Professor Rogerson seeks to portray the bargaining that goes on between broadcasters and MVPDs as one-sided, citing instances in which negotiations between programmers and broadcasters have led to a temporary impasse, and arguing that

[51] Sokler Letter at 3-4. Professor Rogerson's report in the DirecTV/Fox merger also focused on the increased market power Fox allegedly would enjoy "because the lasting losses to the rival MVPD resulting from the fact that that customers shift to DirecTV will become lasting gains for News Corp., the owner of DirecTV." See William P. Rogerson, *An Economic Analysis of the Competitive Effects of the Takeover of DirecTV by News Corp.*, (June 13, 2003).

[52] See Jayne O'Donnell, "NBC Vivendi Merger Hits Possible Snag," *USA Today* (December 31, 2003) (available at http://www.usatoday.com/money/media/2003-12-31-merger_x.htm, viewed March 18, 2005); see also Letter from Susan Creighton, Director, Bureau of Competition, to Brackett B. Denniston, General Counsel, General Electric, (April 20, 2004) (available at http://www.ftc.gov/os/closings/staff/040420ge.pdf, viewed March 18, 2005).

these anecdotes are evidence that broadcasters have the superior position in the negotiations by virtue of their "must have" programming.[53]

Negotiations between broadcasters and MVPDs can perhaps accurately be characterized, as the Commission has put it, as a "balance of terror."[54] But the notion that cable operators are lacking in bargaining leverage and thus are always forced to capitulate to broadcasters is at variance with the facts.

For example, as this is written, Cox Communications and the Washington Post Company are in an extended dispute with Nextar Broadcasting over carriage of Nextar's CBS- and NBC-affiliated local broadcast stations in four markets (Abilene, San Angelo, and Texarkana, Texas, and Joplin, Missouri). Nextar pulled its signals off the four cable systems effective January 1, 2005, insisting on some form of financial compensation for carriage of its programming. If Professor Rogerson were right – that broadcasters have substantial market power over MVPDs – we would have expected the cable systems to accede quickly to Nextar's demands. Instead, after three months, the dispute continues. As the Commission predicted, both sides are suffering from the impasse, but certainly there is no evidence that the cable systems are suffering more. Indeed, according to a report in *Broadcasting & Cable*, the impasse has led to a 40 percent increase in demand for television "rabbit ears" (which have also been offered for free by the cable companies), and forced Nextar to reduce its advertising rates by 30 percent.[55]

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53 Social Cost at 20-21.

54 News Corp/DIRECTV, at ¶180.

55 See John M. Higgins and Bill McConnell, "No Cash, No Carry," *Broadcasting & Cable* (February 7, 2005) (available at http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA501628, viewed March 21, 2005). It should be noted that at last one of the stations, KRBC Channel 9 in Abilene, is available on the Dish Network – a fact which, according to Professor Rogerson, should further weaken the bargaining

Companies involved in such negotiations may also seek to strengthen their negotiating positions by leveraging the legal/political/regulatory process, as was the case in recent licensing negotiations between Cox and ESPN.[56] In May 2003, Cox Communications Chairman James Robbins testified before the Senate Commerce Committee in favor of legislation that would force companies like Disney/ESPN to offer their programming *a la carte*. At the time, Cox was nearing the end of its carriage agreement with ESPN, and the *a la carte* proposal was seen as a way for Cox to increase its bargaining leverage vis-à-vis ESPN in the negotiations.

In March 2004, after the negotiations had been successfully completed, Mr. Robbins appeared again before the Committee, but this time testified that *a la carte* was "not in consumers best interests." Noting this surprising change in position, Chairman McCain queried Mr. Robbins: "When did you find yourself on the road to Damascus?" Chairman McCain asked.

"As soon as [ESPN President] Mr. Bodenheimer got real in his pricing," Mr. Robbins replied. "My efforts last spring to move ESPN ... to a tier was to get the attention of the Walt Disney Company and bring them to reasonable levels of prices."[57]

One might draw several conclusions from these episodes, but the most obvious is that both broadcasters and cable companies have multiple weapons in their negotiating arsenals, from giving away free rabbit ears to lobbying Congress (or the

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power of the local cable system and lead to a quick capitulation. See www.krbctv.com, viewed March 23, 2005.

[56] While the Cox-ESPN negotiations did not involve broadcast retransmission consent, the episode nonetheless illustrates clearly how public policy can become at negotiating tool in such situations.

[57] Hearing Of The Senate Commerce, Science, and Transportation Committee, "Escalating Cable Rates: Causes And Potential Solutions," *Federal News Service* (March 25, 2004), at 32-33.

FCC) for new regulations. But to argue, as Professor Rogerson does, that one side has disproportionate leverage is simply at variance with the facts.[58]

D. The Offering of a Bundle of Broadcast and MVPD Programming Reflects Economies of Scope and Other Efficiencies, Not Market Power

While Professor Rogerson refers repeatedly to "bundling" and "tie-ins," at least some broadcasters do not engage at all in tying (i.e., the refusal to sell their broadcast programming unless cable operators also carry their MVPD programming), and engage in only the most innocuous form of bundling (i.e., they offer discounts on sales of multiple products).[59] Moreover, as Professor Rogerson has argued in other contexts, it is well established in the economics literature that bundling is often economically efficient. Indeed, in his report in the *a la carte* proceeding, Professor Rogerson offers a spirited defense of the practice:

> Standard economic theory suggests that some bundling and tiering of programming is likely to be efficient, that the precise form of the efficient tiering scheme is likely to depend in complex ways on market conditions that cable systems will understand better than regulators, and that cable systems will generally have an incentive to choose efficient tiering schemes because cable systems can charge subscribers higher prices by providing them with packages of services they value more highly.[60]

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[58] The notion that broadcasters gain materially from owning MVPD networks is also challenged by Viacom Chairman Sumner Redstone's proposal to break the company into two separate divisions, thereby separating the CBS network and stations from Viacom's MTV Network cable networks. Redstone's rationale is that MTV's affiliation with CBS *lowers* its market capitalization, a conclusion that is explicitly contrary to Professor Rogerson's "leveraging" theory. See John Higgins, "Double Your Pleasure: Viacom Chairman Redstone Explains His Plan to Split Up an Empire," *Broadcasting & Cable* (March 21, 2005) at 18-19. ("Redstone says that, today, MTV is locked up in a company that trades at around eight times annual cash flow, a relatively low valuation. 'Separated, I believe, it will have a multiple of 16. That alone is an enormous change.'")

[59] On the practices of the broadcasters, see Comments of the Walt Disney Company in this proceeding. This form of bundling is often referred to as "mixed bundling." See Barry Nalebuff, *Bundling, Tying and Portfolio Effects: Conceptual Issues*, United Kingdom, Department of Trade and Industry (February 2003), at 13-17. (Hereafter "Nalebuff 2003.")

[60] William P. Rogerson, "Cable Program Tiering: A Decision Best and Properly Made by Cable System Operators, Not Government Regulators," (November 10, 2003), at 6. (Hereafter "Tiering.") Professor Rogerson acknowledges that his view of bundling is different in the two proceedings, and says the difference is due to the fact that "The economic motivations that MVPDs have to bundle programming at the retail level are very different than the economic motivations that explain the type of bundling that

. . .
[I]t seems likely that profit maximizing firms will generally have an incentive to bundle products efficiently. This is simply because they can charge consumers more money by providing them with packages that better fill their needs.[61]

. . .
[E]ven a firm with market power will generally want to supply its customers with their most preferred mix and packaging of products because it will be able to charge consumers the highest possible price by so doing.[62]

. . .
Allowing government to regulate how firms with market power bundle products will only increase the likelihood that the firms do not offer the most efficient bundle of products, but will not prevent them from charging monopoly prices for whatever bundles of products they do sell.[63]

Needless to say, Professor Rogerson takes a different view of bundling when it is undertaken by broadcasters in their negotiations with cable companies, arguing that the broadcasters are using bundling to "leverage" their market power over one good (broadcast channels) into markets for related goods (cable networks).[64] Specifically, based on an article by Michael D. Whinston,[65] he argues that "it seems likely that an additional motivation broadcasters may have to bundle retransmission consent together with other network programs is to capture larger market shares from their potential competitors and thereby either foreclose them from entering entirely or at least weaken them."[66]

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occurs in the case of bundling of retransmission consent together with cable channels at the wholesale level." (See Tiering at n. 65.) Nowhere, however, does he explain why.

[61] Tiering at 10-11.

[62] Tiering at 11.

[63] Tiering at 12.

[64] Social Cost at 47. In the preceding section, Professor Rogerson offers a several possible explanations for why both the cable operators and the broadcasters may have preferred "in kind" compensation to cash compensation for retransmission. While some of these explanations may well be valid, they have little or nothing to do with whether the practice enhances or detracts from consumer welfare.

[65] Michael D. Whinston, "Tying, Foreclosure, and Exclusion," *American Economic Review* 80;4 (September 1990), 837-859.

[66] Social Cost at 48.

But neither the Whinston article nor the broader literature on bundling suggests that the conditions in the MVPD programming market are conducive to anticompetitive bundling. Whinston's result, for example, is described by Professor Rogerson as showing that bundling can be effective as a means of leveraging market power when at least one of the bundled products is characterized by increasing returns to scale. Since television production is indeed characterized by increasing returns, he concludes that is what must be happening here.

But Whinston's result applies only in a very narrow set of circumstances which do not appear to apply to this market;[67] and, in general, the circumstances in which bundling may be used to achieve anticompetitive ends are extremely limited, especially, as here, when at least one of the markets involved is fully competitive.[68] Certainly, Professor Rogerson does not demonstrate that the conditions for anticompetitive bundling are present in the market for MVPD programming.

A close reading of Professor Rogerson's report and the JCC comments suggests that their real complaint is that broadcasters are being successful in their competition with vertically integrated MVPD networks to produce and market MVPD programming, i.e., that the "bundling" of which they complain is simply that broadcasters are producing and successfully marketing both broadcast and cable programming. But the success of

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67 For example, his result holds for products with independent demand only if the seller is able to pre-commit never to unbundle the goods in future periods. Such pre-commitment would not be possible in the market for television programming, where contracts are negotiated every three years. (See Whinston at 841-46.)

68 Even Professor Nalebuff, one of the leading exponents of anticompetitive theories of product bundling, concedes that "There is often a presumption that firms can leverage power from one market to another. The Chicago School argument provides some surprisingly general conditions under which such leverage is not possible. It is particularly difficult to increase profits by using monopoly power to create leverage into competitive markets." (See Nalebuff 2003 at 19.)

broadcasters in the MVPD programming marketplace is almost certainly the result of economic efficiency, as Professor Rogerson explains in his report:

> [T]here are significant 'economies of scope' for the networks between producing programming for their own use and producing programming that can be shown on MVPD networks. Once the networks were acquiring and/or producing significant amounts of content for use on their broadcast outlets, they found that they could use substantial amounts of in-house content that already existed and produce additional content at a relatively low incremental cost for distribution on affiliated MVPD networks. In many cases, this gave them a competitive advantage over other rivals....[69]

Thus, he concludes,

> [T]he networks would have entered the MVPD network programming industry to some extent regardless of whether or not retransmission consent had been enacted.[70]

On these points we agree with Professor Rogerson entirely.

IV. SUMMARY AND CONCLUSIONS

In summary, JCC and Rogerson misapprehend both the cause and the effect in this matter. With respect to the effect, it simply is not the case that cable television prices are rising rapidly, or that MVPDs are being forced to carry networks consumers do not want to watch. Quality-adjusted prices are rising less rapidly than inflation, and consumers are watching more cable television every year.

With respect to cause, retransmission consent does not lead to anticompetitive effects in the market for MVPD programming. To the contrary, retransmission consent is nothing more or less than a *de facto* property right – the right of local broadcasters to benefit from the fruits of their investments in creating programming and packaging news

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[69] Social Cost at 14-15.

[70] Social Cost at 17.

and entertainment for the benefit of consumers. Such property rights are essential for, not an obstacle to, the creation of efficiently functioning competitive markets.

Tab F

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	MB Docket No. 03-172
	)	
	)	
	)	
	)	

REPLY COMMENTS

Fox Entertainment Group, Inc. and Fox Television Stations, Inc.; National Broadcasting Company, Inc. and Telemundo Communications Group, Inc.; Viacom; and The Walt Disney Company and The ABC Television Network (collectively the "Broadcast Networks") hereby submit this reply to the opening comments of certain cable industry parties with respect to the retransmission consent practices of the Broadcast Networks. Cox Communications, Inc. ("Cox") and the American Cable Association ("ACA") (together, the "Cable Commenters") seek to obtain retransmission consent without cost as part of their continuing efforts to defeat the retransmission consent negotiation process established by Congress in 1992 to protect broadcasters from the perceived market power of vertically integrated cable companies.

In short, the Cable Commenters ignore the well-founded precedent concerning good faith negotiations for retransmission consent and, in so doing, attempt to transform the Commission's annual review of the market for the delivery of video programming into a platform to address their unfounded retransmission consent grievances. The

Commission should ignore the Cable Commenters' plea for unwarranted governmental intervention in marketplace negotiations.

I. STRIPPED OF VERBIAGE, COX AND ACA SIMPLY WANT A FREE RIDE ON SOME OF THE MOST VALUABLE PROGRAMMING THEY CARRY – THE BROADCAST NETWORKS

Cox, a vertically integrated cable operator (under common control with the licensee of broadcast television stations), complains that the Broadcast Networks require carriage of their affiliated cable programming channels in exchange for retransmission consent. The reality is that the Broadcast Networks offer Cox and other cable operators multiple options for consideration in exchange for retransmission consent, most often a cash payment per subscriber or carriage of affiliated cable programming channels. Whether Cox or any cable operator carries affiliated programming channels or pays cash is the result of its choices made in marketplace negotiations. Cox has offered no evidence whatsoever that these negotiations fail to maximize consumer, broadcaster and cable operator welfare.[1]

ACA, which represents smaller market cable operators, also alleges that its members are "forced" to carry cable program channels affiliated with the Broadcast Networks.[2] ACA – whose earlier Commission filings Cox cites with approval – makes clear, however, that its members in fact have an option to pay cash for retransmission consent (though it complains that the price is too high). Yet, ACA makes no effort to

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1 Cox alleges that the retransmission consent practices of the Broadcast Networks crowd out independent cable programming. *See* Cox Comments, at 18. Cox, however, does not cite (and the Broadcast Networks are not aware of) a single instance where an independent channel was in fact not carried or was dropped due to retransmission consent negotiations.

2 ACA Comments, at 5.

explain why payment for what is often a cable operator's most popular programming – broadcast networks – is unreasonable or disproportionate to the costs paid for other cable programming. Moreover, it is ironic to say the least that ACA complains about cash charges for retransmission consent that Cox's television stations seek.[3] Indeed, ACA has asserted elsewhere that Cox is "demanding strictly cash for carriage, take it or leave it."[4]

In any event, ACA makes little effort to conceal its real goal: to avoid payment for some of the most popular programming available on its cable systems. As James Gleason, Chairman of ACA and CEO of a small cable company, recently admitted: "We do want [retransmission consent] free and so do the big [cable] guys."[5]

Cox's intentions are no different. After complaining about carriage of broadcaster-affiliated cable networks, Cox seems to suggest that broadcasters should not be permitted even to seek cash payments in exchange for retransmission consent.[6] Thus Cox would have its cake and eat it too – barring broadcasters from accepting either cash payments or carriage of additional cable channels. This suggestion should be rejected out of hand as unwarranted interference with marketplace bargaining.

The fact is, the retransmission negotiation process has worked well, with very few bargaining impasses. The parties reach agreement because each side realizes important

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3 *See* ACA Comments, at 8.

4 ACA Reply Comments, at 2, filed as part of the Commission's Biennial Regulatory Review Proceeding, *In Re 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, FCC 02-249 (released September 23, 2002).

5 Ted Hearn, "Little Ops Unafraid to Take On Net Powers," Multichannel News, at 7 (June 9, 2003).

6 *See* Cox Comments, at 19.

benefits. Cable operators benefit from carriage of network-owned stations and the broadcaster-affiliated cable networks they choose to carry. For their part, broadcasters must achieve carriage of their stations to ensure that they reach the widest audience possible. Neither the broadcast network nor a local television station can afford to lose even a few percentage points of audience coverage. The ability to reach virtually every viewer nationwide has always been a critical factor in the attractiveness of broadcast networks to national advertisers. If a network is unable to provide complete nationwide reach, it would no longer be able to command advertising rates comparable with those charged by its competition and would be handicapped in competing for the most attractive programming. These powerful economic forces must be considered by the Broadcast Networks when they negotiate for retransmission consent and help to ensure that agreement is reached.

II. BARGAINING PROPOSALS THAT INCLUDE VARIOUS FORMS OF CONSIDERATION IN EXCHANGE FOR RETRANSMISSION CONSENT ARE EXPRESSLY PERMITTED BY THE FCC'S RULES AND BENEFIT CABLE OPERATORS

The Broadcast Networks are in full compliance with the FCC's retransmission consent rules. Cox and ACA not only unfairly describe the substance of retransmission consent negotiations, they also completely ignore the FCC's well-established rules, which require "good faith" negotiation on the part of broadcasters. Under these rules, a cable company (or other multichannel video programming distributor ("MVPD")) that is aggrieved by a broadcaster displaying a lack of good faith in retransmission consent negotiations can file a complaint with the FCC against that broadcaster.[7] The rules

[7] *See* 47 C.F.R. § 76.65. The letter to the Commission from Sylvia Lesse and Marci Greenstein on behalf of a coalition of small video operators (the

prohibit, for example, a simple refusal to negotiate or "take it or leave it" proposals – such as the Cox bargaining tactics described by ACA.[8] Neither Cox nor ACA offers any evidence or policy reason why the Broadcast Networks' retransmission negotiations violate the Commission's rules.

On the contrary, the legislative history of the 1992 Cable Act and Commission precedent make clear that unfettered negotiation is necessary to ensure a competitive balance in the video marketplace. When Congress passed the retransmission consent provision of the Cable Act in 1992, it acted to ensure the continued viability of over-the-air television and to protect its related public interest benefits.[9] As the Senate Report explained, the legislation was in part designed to put an end to the subsidization of cable operators by broadcasters:[10]

> Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with

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"Coalition") simply incorporates prior comments of its members and focuses, in large part, on the adequacy of the Commission's retransmission consent complaint procedures. *See* Letter to Marlene Dortch, submitted September 11, 2003. While the Coalition rails against the structure and effectiveness of the procedures, the anonymous complaint fails to cite a specific example of the system's failure. This general indictment of the Commission's processes does not supply any evidence that the procedures do not work.

8 47 C.F.R. § 76.65(b).

9 S. Rep No. 102-92 (1991) ("The Committee has concluded that the exception to section 325 for cable retransmissions has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting.").

10 *See id.* ("In addition to using its market power to the detriment of consumers directly, a cable operator with market power may be able to use this power to the detriment of programmers. Through greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors.").

> broadcasters. While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.[11]

The Senate Report also concluded that cable operators should pay for carriage of a broadcast signal, just as they pay for cable program services:

> Cable television is now an established service. Cable operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should not be treated differently.[12]

Furthermore, Congress recognized that, in the exercise of their retransmission consent rights, broadcasters may seek alternative forms of compensation.[13] "[Some] broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system."[14]

The Commission's rules regarding retransmission consent are fully consistent with the congressional mandate. The Commission expressly permits offering retransmission consent on a barter basis (*e.g.*, carriage of associated cable network or other broadcast stations). As the FCC has explained: "*We do not find anything to suggest that, for example, requesting an MVPD to carry an affiliated channel, another broadcast signal in*

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[11] *Id.*

[12] *Id.*

[13] *See id.*

[14] *Id.*

the same or another market, or digital broadcast signals is impermissible or other than a competitive marketplace consideration . . . [and] we point out that these are bargaining proposals which an MVPD is free to accept, reject or counter with a proposal of its own."[15]

The ability to include carriage of an associated cable network as part of retransmission consent negotiations is not only permitted by the Commission – it also benefits cable companies by expanding bargaining options. As the Commission has explained: "We also believe that to arbitrarily limit the range or type of proposal that the parties may raise in the context of retransmission consent will make it more difficult for broadcasters and MVPDs to reach agreement. By allowing the greatest number of avenues to agreement, we give the parties latitude to craft solutions to the problem of reaching retransmission consent."[16]

Nationwide bargaining for retransmission consent is fully consistent with the Commission's rules. Cox also claims that the Broadcast Networks "negotiate retransmission consent for all of their [network-owned stations] nationwide at the same

---

15 *In Re Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 56 (2000) ("*SHVIA Order*") (emphasis added). In 2001, the FCC applied this principle in rejecting a complaint brought by EchoStar. The FCC stated that "offering retransmission consent in exchange for the carriage of other programming such as a cable channel" is "consistent with competitive marketplace considerations." *In Re EchoStar Satellite Corporation v. Young Broadcasting, Inc.; KRON-TV, Young Broadcasting Co. of San Francisco; Young Broadcasting of Nashville, Inc.; News 2, Inc.; Young Broadcasting of Los Angeles, Inc. and KCAL-TV*, Memorandum Opinion and Order, 16 FCC Rcd 15070, ¶ 21 (2001). The FCC added more specifically that "[g]ood faith negotiation requires only that the broadcaster at least consider some other form of consideration if the MVPD cannot accommodate such carriage." *Id.*

16 *SHVIA Order*, at ¶ 56.

time, and have conditioned such consent on carriage of their affiliated cable programming on all of the cable operator's systems nationwide (not just where the cable system and the network-owned station share a market)."[17] In other words, Cox apparently is worried that retransmission consent negotiations could result in a particular Cox cable system agreeing to carry cable programming affiliated with a Broadcast Network even though the network may not have a broadcast station in the local market in question.[18] Consequently, according to Cox, retransmission consent negotiations no longer are based on the value of a broadcast station to the local market. Nothing compels Cox to choose the same form of consideration in every market – in some markets Cox could agree to pay cash while in others it could agree to carry programming. In short, if the value of a broadcast station to the cable subscribers in the local market is not part of the calculus Cox uses to determine what it is willing to pay for retransmission consent rights, it is only because of the particular manner in which Cox conducts its retransmission consent negotiations.

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[17] Cox Comments, at 17.

[18] Similarly, ACA previously has claimed that ABC (as well as other broadcasters) required a system operator to carry an ABC-affiliated cable channel on another of the operator's cable systems in a market where ABC did not own a television station. *See Petition for Inquiry Into Retransmission Consent Practices*, filed October 2, 2002, at 34. ACA neglected to mention, however, that the cable operator's system in the market where ABC owned a television station lacked the capacity to add an ABC-affiliated cable channel. Therefore, as an accommodation, ABC agreed that the capacity-constrained system operator could add the ABC-affiliated cable channel to another of the operator's cable systems that was not capacity-constrained. ACA should not be heard to complain now about a practice that was designed for its member's benefit.

Cox also criticizes the "high level of corporate involvement" in the retransmission consent negotiation process.[19] However, cable operators themselves negotiate carriage of cable networks at the corporate level. Just as a cable programmer seeks carriage on a national level, a multiple system operator, such as Cox, can add or drop a cable network on most or all of its individual local cable systems. And again, if Cox believes that local conditions warrant, it can choose to pay cash rather than carry a broadcaster's associated cable network on a particular system.

CONCLUSION

Congress established the current retransmission consent regime to "help preserve local broadcast service to the public."[20] The complaints of the Cable Commenters are little more than ill-conceived attempts to revisit and defeat the retransmission consent process established by Congress. The present retransmission consent negotiation process works as envisioned by Congress and the Commission, helping to ensure a competitive video marketplace.

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19 *Id.* at 18.

20 *In Re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723, ¶ 104 (1994).

Respectfully submitted,

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NATIONAL BROADCASTING COMPANY, INC. and TELEMUNDO COMMUNICATIONS GROUP, INC.

VIACOM

THE WALT DISNEY COMPANY and
THE ABC TELEVISION NETWORK

By: /s/ John C. Quale
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September 26, 2003

Tab G

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December 23, 2003

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: MB Docket No. 03-172

Dear Ms. Dortch:

On behalf of Fox Entertainment Group, Inc. and Fox Television Stations, Inc.; National Broadcasting Company, Inc. and Telemundo Communications Group, Inc.; and Viacom (collectively, the "Broadcast Networks"), this letter is submitted to respond to certain misstatements made by Cox Communications, Inc. ("Cox") in its October 14, 2003 *ex parte* letter submitted to the Commission as part of the above-referenced proceeding.[1]

The Cox Letter asserts that the Broadcast Networks (and Disney/ABC) "did not in fact offer Cox a cash payment option in the retransmission consent negotiations they conducted between 1998 and 2003."[2] This statement not only has no basis in fact, it also is contradicted by the very declaration that Cox submitted in support of its allegation.[3] Indeed, the Wilson Declaration specifically concedes that

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1 *See* Letter of To-Quyen T. Truong to the FCC, dated October 14, 2003 (the "Cox Letter").

2 *Id.* at 1.

3 *See* Declaration of Robert Wilson, Cox's Vice President of Programming, attached to the Cox Letter (the "Wilson Declaration").

Disney/ABC offered Cox a cash payment option for retransmission consent in February 2003.[4]

Moreover, Cox was compelled to "clarify" its allegation in a supplemental *ex parte* letter filed little more than a month after the submission of the Wilson Declaration.[5] In its supplemental letter, Cox discloses that in addition to the cash offer from Disney/ABC, it "received a cash offer earlier this year from Viacom/CBS . . . ."[6]

The reality is that each of the Broadcast Networks offers cable operators – including Cox – multiple options for consideration in exchange for letting the cable operators carry the valuable programming provided by the Broadcast Networks' owned-and-operated television stations ("O&Os"). Included herewith are declarations from executives of each of the Broadcast Networks who are familiar with their companies' retransmission consent negotiations with Cox. In addition, The Walt Disney Company and The ABC Television Network today also submitted a letter and a declaration from its executive that handles retransmission consent negotiations. As the declarations make clear, in its retransmission consent negotiations with the Broadcast Networks and Disney/ABC, Cox in fact rejected any offers for a cash payment option.

Provided below is a summary of the Broadcast Networks' and Disney/ABC's most recent retransmission consent negotiations with Cox:

- ABC: As described in the Declaration of Benjamin N. Pyne, Senior Vice President of Affiliate Sales and Marketing, ABC Cable Networks Group, "Cox has had in the past, has today and will have in the future, the option of entering into a cash standalone

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4 *See id.* The Cox Letter attempts to discount Disney/ABC's cash payment offer by calling it a "casual remark" made during a telephone conversation with Mr. Wilson, rather than acknowledging it as a "formal offer." Cox Letter, at 1. In the context of negotiations between sophisticated and experienced negotiators, however, it makes little difference whether an offer is presented with any particular formalities. What matters is that a Disney/ABC senior vice president made Cox a cash offer, which Cox was free to reject or pursue.

5 *See* Letter of To-Quyen T. Truong to the FCC, dated November 24, 2003, at 1.

6 *Id.*

Retransmission Consent contract for cable carriage of one or more of the ABC Owned Television Stations."[7]

- CBS: As described in the attached Declaration of Martin Franks, Executive Vice President of CBS and Senior Vice President of Viacom, Viacom specifically offered Cox a cash payment option for retransmission consent for KCBS Digital, KCAL Analog and Digital and all of Viacom's UPN O&Os (the only Viacom television stations not covered under a previous agreement) in February 2003.[8] Cox responded that it "has not done cash retransmission consent deals in the past," and instead indicated its desire to negotiate retransmission consent for the CBS and UPN O&Os in connection with the negotiations for carriage of Viacom's affiliated MTV Networks cable programming services.[9]

- FOX: As described in the attached Declaration of Lindsay Gardner, Executive Vice President of Affiliate Sales and Marketing for Fox Cable Networks Group, Cox and Fox Cable Networks Group recently extended an agreement enabling Cox to carry several of Fox's regional sports cable networks ("RSNs"), as well as two additional Fox cable channels.[10] As part of the negotiations over carriage of these cable channels, Cox demanded that Fox also extend the retransmission consent agreement for all of the Fox O&Os (which was not scheduled to expire until May 1, 2004). Therefore, because it was Cox that "insisted on combining the extension of its [retransmission consent] agreement with its agreements relating to the RSNs, Fuel and National Geographic Channel, there was no opportunity or reason to offer Cox a cash alternative for a stand-alone retransmission consent agreement."[11] In addition, Cox did not

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7 *See* Declaration of Benjamin N. Pyne, Senior Vice President of Affiliate Sales and Marketing, ABC Cable Networks Group, filed with the letter of Susan L. Fox, dated December 23, 2003, on behalf of The Walt Disney Company and The ABC Television Network.

8 *See* Declaration of Martin Franks, Executive Vice President of CBS and Senior Vice President of Viacom, attached hereto as Exhibit A.

9 *Id.*

10 *See* Declaration of Lindsay Gardner, Executive Vice President of Affiliate Sales and Marketing, Fox Cable Networks Group, attached hereto as Exhibit B.

11 *Id.*

request a cash payment alternative for a stand-alone retransmission consent agreement in either of its last two negotiations with Fox.

- NBC: As described in the attached Declaration of Jodi Brenner, Associate General Counsel for NBC Cable Networks, Cox and NBC recently concluded negotiations to extend a pre-existing retransmission consent agreement that permits Cox to carry all of NBC's O&Os as well as affiliated NBC cable programming, including the Olympics.[12] "At no time during these negotiations did Cox request a cash alternative or a stand-alone retransmission consent agreement."[13]

The Cox Letter also decries what it calls the "inflated" rates that cable operators pay to carry the Broadcast Networks' affiliated cable programming channels.[14] The Commission, however, should have no difficulty dismissing this complaint as completely unfounded. As made clear by the recent findings of the United States General Accounting Office: ownership affiliation between broadcasters and cable networks "had no influence on cable networks' license fees."[15] In other words, the rates that Cox pays to carry the Broadcast Networks' affiliated cable programming channels are wholly in line with what Cox pays to carry all of its other cable programming channels.

In sum, Cox's *ex parte* letter constitutes just another part of its ongoing effort to revisit and defeat the retransmission consent process established by Congress to protect broadcasters from the perceived market power of vertically integrated cable companies. The Commission should reject Cox's plea for unwarranted governmental intervention in marketplace negotiations.

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12 *See* Declaration of Jodi Brenner, Associate General Counsel for NBC Cable Networks, attached hereto as Exhibit C.

13 *Id.*

14 *See* Cox Letter, at 3.

15 *See Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, Report of the U.S. General Accounting Office, October 2003, at 29.

Should you have any questions concerning this submission, kindly contact the undersigned.

Very truly yours,

John C. Quale
Counsel to the Broadcast Networks

Enclosures

cc: Kenneth Ferree
Marsha Glauberman
Andrew Wise
Linda Senecal
Qualex International

EXHIBIT A

Declaration of Martin Franks
Executive Vice President of CBS and Senior Vice President of Viacom

CBS

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MARTIN D. FRANKS
EXECUTIVE VICE PRESIDENT

DECLARATION OF MARTIN D. FRANKS

1) My name is Martin D. Franks. I am executive vice president of CBS and Senior Vice President of Viacom. In my position I have responsibility for negotiating the retransmission consent agreements for all of Viacom Inc.'s owned-and-operated television stations ("O&Os"), including CBS and UPN stations as well as KCAL.

2) I have noted with interest the assertion by Cox Communications, Inc. ("Cox") that it has never received a "cash offer" from a network broadcaster for retransmission consent.

3) On February 26, 2003, I conveyed to Ms. Kathy Payne, Executive Director of Programming for Cox, an offer whereby Cox Cable could secure retransmission consent for all of the Viacom O&Os not covered under a previous agreement. Specifically, the offer covered KCAL analog and digital, KCBS digital, and all of the Viacom UPN O&Os.

4) While the precise terms of the offer are proprietary and confidential, the proposed terms specifically included only cash and promotional considerations. The proposal did not call for any consideration related to carriage of Viacom's affiliated cable programming networks.

5) At the time I sent the offer to Ms. Payne, she told me that "Cox has not done cash retransmission consent deals in the past," but that the offer would be discussed internally.

6) On March 19, Cox, solely at its discretion, informed CBS and Viacom that Cox preferred to negotiate retransmission consent for the relevant stations in connection with the negotiations for carriage of Viacom's affiliated MTV Networks cable programming services.

I declare under penalty of perjury that the foregoing is true and correct.

Martin D. Franks

Martin D. Franks

Executed: December 22, 2003

EXHIBIT B

Declaration of Lindsay Gardner
Executive Vice President of Affiliate Sales and Marketing, Fox Cable Networks Group

Declaration of Lindsay Gardner

1. My name is Lindsay Gardner. I am Executive Vice President of Affiliate Sales and Marketing for the Fox Cable Networks Group ("Fox Cable"), a position I have held since May 1999. My responsibilities include the sale and marketing of the various cable program networks owned and managed by Fox Cable to cable operators and satellite distributors. Over the past several years, I have also been responsible for retransmission consent negotiations on behalf of Fox owned and operated television stations.

2. On November 25, 2003 Fox Cable concluded an agreement with Cox Communications ("Cox") for renewal of the carriage by Cox-owned cable systems of six Fox Cable regional sports networks ("RSNs") serving 3.3 million Cox subscribers. The agreement extended a 1999 contract that was scheduled to expire on December 31, 2003. As part of that agreement, Cox committed to launch two additional cable networks owned and operated by Fox Cable: *Fuel* and *National Geographic Channel.*

3. In January 2000, Cox and Fox Television Holdings ("FTH") entered into a retransmission consent ("RTC") agreement relating to the carriage of FTH owned and operated stations on Cox-owned cable systems. The term of that RTC agreement was scheduled to expire on May 1, 2004, and it was not the intention of Fox Cable to enter into negotiations for the extension of that agreement until some time during the early part of 2004. However, Cox insisted on negotiating for an extension of the RTC agreement in connection with the negotiations that related to, and concluded with, the agreements for the carriage of the RSNs, *Fuel* and *National Geographic Channel.* A new RTC agreement between FTH and Cox was therefore negotiated and entered into on November 25, 2003 – the same date as the RSN, *Fuel* and *National Geographic Channel* agreements.

4. Since Cox insisted on combining the extension of its RTC agreement with its agreements relating to the RSNs, *Fuel* and *National Geographic Channel*, there was no opportunity or reason to offer Cox a cash alternative for a stand-alone retransmission consent agreement.

5. In neither the January 2000 negotiation nor the November 2003 negotiation did Cox

at any time request a cash alternative for a stand-alone retransmission consent agreement.

I declare under penalty of perjury that the foregoing is true and correct.

Lindsay Gardner
Executive Vice President of
Affiliate Sales & Marketing
Fox Cable Networks Group

Executed on december 17, 2003

EXHIBIT C

Declaration of Jodi Brenner
Associate General Counsel for NBC Cable Networks

Declaration of Jodi Brenner

1. My name is Jodi Brenner. I am Associate General Counsel for NBC Cable Networks ("NBC Cable"), and have been with NBC Cable for five and a half years. Since 1998, (with a brief break in early 2000) my responsibilities have included the negotiating and drafting of distribution agreements with cable and satellite distributors for the cable programming networks owned and managed by NBC Cable, as well as the Olympics on cable and the retransmission consent for NBC owned and operated television stations.

2. During the period from 1998 through 2003 referenced by Cox Communications, Inc. ("Cox") in an October 14, 2003 filing with the Federal Communications Commission, NBC did not enter into a new Retransmission Consent Agreement with Cox, but rather extended an existing agreement that included the right for additional programming, including the Olympics on cable. In that Agreement, Cox secured the right to retransmit all NBC owned and operated television stations through calendar year 2008.

3. At no time during these negotiations did Cox request a cash alternative or a stand-alone retransmission consent agreement.

I declare under penalty of perjury that the foregoing is true and correct.

Jodi Brenner

Jodi Brenner
Associate General Counsel
NBC Cable Networks

Executed on December 19, 2003

Tab H

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 23, 2003

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE *Ex Parte* Filing in MB Docket No 03-172

Dear Ms Dortch

This letter is submitted in response to the *ex parte* letter submitted by Cox Communications, Inc on October 14, 2003

The rhetorical exchange between Cox Cable and the Broadcast Networks began with Cox's complaint that the Broadcast Networks required Cox to carry cable program networks in consideration for the right to retransmit Network owned broadcast stations In response, the Networks noted that Cox had the option of paying cash for retransmission consent and thereby avoiding the need to carry any Network owned cable programming services In their latest submission, Cox complains that the standalone cash option offered by ABC was not communicated with sufficient formality

It would not appear to serve any useful purpose for ABC to engage in continued exchanges with Cox regarding the details or adequacy of past cash offers As demonstrated by the attached declaration of Ben Pyne, the record is now crystal clear that ABC is very willing (even eager), to offer standalone cash retransmission consent deals to Cox Cable Therefore, there is absolutely no basis for the Commission to give any consideration to Cox's complaint regarding retransmission consent arrangements involving carriage of Network owned cable program services. In concluding, we simply note that it is more than a little ironic that the cable network consideration about which Cox complains was developed in response to the well documented disinclination of Cox Cable and other MSOs to pay cash consideration for broadcast retransmission

Very truly yours,

Susan Fox

Susan L Fox

Attachment

No. of Copies rec'd 0+2

DECLARATION OF BEN PYNE

I am Senior Vice President of Affiliate Sales and Marketing for ABC Cable Networks Group Among other responsibilities, I am responsible for working with the ABC owned television stations to negotiate retransmission agreements for the ten ABC Owned Television Stations

Cox has had in the past, has today and will have in the future, the option of entering into a cash standalone Retransmission Consent contract for cable carriage of one or more of the ABC Owned Television Stations.

I hereby declare, under penalty of perjury, that, to the best of my knowledge, information, and belief, all of the factual information contained in this Declaration is accurate and complete

Benjamin N. Pyne
Senior Vice President of Affiliate
Sales and Marketing
ABC Cable Networks Group

December 22, 2003

EXHIBIT B

Response to Comments Regarding Economic Consequences of Retransmission Consent

by Michael G. Baumann and Kent W. Mikkelsen
Economists Incorporated

March 31, 2005

Response to Comments Regarding Economic Consequences of Retransmission Consent

Michael G. Baumann and Kent W Mikkelsen

I. Introduction

Viacom has asked us to respond to certain points raised by certain commenters[1] in the Commission's current proceeding.[2]

1. Commenters state that owners of broadcast television stations, including Viacom, have "market power" that is used in the negotiation of retransmission consent. Furthermore, they claim that when retransmission consent is granted in return for agreement to carry non-broadcast MVPD programming, this results in harm to competition in the market for MVPD programming.
2. Commenters state that retransmission consent has been a major factor in rising cable rates paid by consumers.
3. Commenters state that retransmission consent has brought little or no benefit to consumers.

Our response can be summarized as follows:

1. Viacom and other owners of broadcast television stations have "market power" only in the limited sense that they have some discretion over price, a feature shared with many firms in the economy. Viacom does not have the type or degree of market power that leads to harm to competition or to consumers. Moreover,

[1] The comments to which we respond include Comments of Joint Cable Commenters ("JCC"), Comments of EchoStar Satellite L.L.C. ("EchoStar"), Comments of the American Cable Association ("ACA") and William P. Rogerson, "The Social Cost of Retransmission Consent Regulations" ("Rogerson").

[2] In the Matter of Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace, MB Docket No. 05-28.

obtaining carriage of non-broadcast MVPD programming in return for retransmission consent does not harm competition in the market for MVPD programming.

2. Retransmission consent has not been a major factor contributing to the increase in cable rates.
3. Retransmission consent provides incentives to television stations and broadcast networks to increase investment in programming.

II. Market Power and Competitive Effects

The 1992 Cable Act established two methods by which cable systems carry local broadcast station signals—must carry and retransmission consent. Under must carry, cable systems are not required to pay local broadcast stations for the right to distribute the local broadcast station signals that they are required by federal law to carry. Alternatively, a local broadcast station may elect to exercise its right to grant retransmission consent. Under retransmission consent, cable systems are not required to carry the local broadcast station's signal, but must negotiate compensation with the local broadcast station if they decide to carry the broadcast station's signal. Similarly, under the Satellite Home Viewer Improvement Act of 1999, satellite operators must negotiate with local television stations to carry their signals.

Both MVPDs and television stations benefit when MVPDs carry the stations. The MVPD benefits because, like other programming it carries, the programming from television stations helps the MVPD attract and retain subscribers, from which it derives subscription revenues. A station benefits because carriage increases the station's audience, and this tends to increase the revenues that the station can obtain from advertisers. In the bargaining that ensues, it has typically been the case that MVPDs have paid some compensation to the television station.

It is not surprising that arm's length, free market negotiations between stations and MVPDs would result in compensation being paid to the television stations. MVPDs pay for the other programming that they carry, so it is not unusual for them to pay for television stations' programming.

Cable carriage of local broadcast station signals produces revenues for cable operators. A cable operator may charge a higher subscription price for a package of programming if local broadcast station signals are included in the package. Alternatively, at any given subscription price, there will be more subscribers and more subscription revenue if local broadcast station signals are carried. Further, having more subscribers means that the cable operator can generate more revenue from the sale of local advertising and other video and non-video services. In these respects, local broadcast station signals play a role similar to popular cable networks and other sources of cable content.

To evaluate the claims made by commenters, it is useful to have an understanding of the term "market power." Under idealized conditions that economists call "perfect competition," competition forces the price at which a firm sells its product to be equal to marginal cost. Economists describe a firm that can consistently sell its product for a price higher than marginal cost as having "market power."

One condition for perfect competition is that there be many firms producing goods that are perfect substitutes for each other. Since firms in many sectors of the economy produce products for which there is no perfect substitute, many firms have some degree of market power. A firm may have market power but still only earn a competitive rate of return or profit due to competition from producers of competing, but somewhat differentiated, products.[3]

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[3] See, Carlton and Perloff, Modern Industrial Organization, Fourth Edition (2005). "A [firm] can set its price above its marginal cost but does not necessarily make a supracompetitive profit. For example, if a [firm] incurs a fixed cost, its profit may be zero (the competitive level) even if its price exceeds its marginal cost." (p. 93); also see, Landes and Posner, "Market Power in Antitrust Cases," Harvard Law Review, Vol. 94, No. 5 (March 1981), pp. 937-983. "… each seller … may have had an average cost greater than its marginal cost, and possibly equal to its price, because each may have incurred (fixed) costs to develop brands that would enjoy the strong consumer preference reflected in [their] elasticity estimates. Even if firms succeed in reducing the elasticity of demand for their brands in this way, they will not have any monopoly profits if there is competition among firms, and consumers will benefit from the better quality and greater variety of products." (p. 957)

Some commenters have stated or implied that television stations, and in particular the television stations affiliated or owned by the four major broadcast networks, have a troubling level of market power.[4] They do so based on Commission statements in the News Corp./DirecTV decision that television stations have market power in retransmission consent negotiations.[5] But commenters do not tell the whole story. To obtain a fuller view of the Commission's position, it is worth quoting the Commission's statement at length:

> Certain parties have argued that the Commission's analysis of the [News Corp/DirecTV] transaction bears some relevance on the present discussion. This represents a misunderstanding of the nature of the Commission's transaction review process as well as the specifics of the transaction between News Corp. and Hughes Electronics. The transaction review process at the Commission is directed at examining *changes* in the competitive landscape that are a direct result of the transaction at issue. To the extent the Commission discussed the "market power" that might reside in the combined entity, it was not passing upon the competitive balance of negotiating power that normally exists between broadcasters/programmers and MVPDs. All differentiated products, such as video programming, possess some degree of market power in the sense that there are no perfect substitutes. The critical question in any analysis involving differentiated products is whether the existing degree of market power is sufficient to allow the firm to profitably engage in the hypothesized anticompetitive activity. In the News Corp. transaction, the potential refusal to sell to competing MVPDs, or vertical foreclosure, was the activity of concern. Commission staff rigorously measured News Corporation's incentive and ability post-transaction to engage in the hypothesized activity and determined that, while permanent foreclosure was unlikely, temporary foreclosure was a real public interest concern. Thus, nothing in the analysis of the News Corp./DirecTV transaction should be read to suggest that the Commission has concluded that the market power of broadcasters is sufficient to lead to competitive harms in the absence of vertical integration.[6]

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[4] See, for example, JCC at 6 and 13; EchoStar at 4 and 5; ACA at 7; and Rogerson at 20.

[5] See, for example, JCC at 13; EchoStar at 3; ACA at 10; and Rogerson at 24-27.

[6] FCC, *Report on the Packaging and Sale of Video Programming Services to the Public*, November 18, 2004, p. 70. Footnotes omitted.

As this quotation shows, the market power which the Commission has found that television stations possess is of the ordinary variety that many firms have, as discussed above. The Commission has not concluded that this market power leads to competitive harm in the absence of vertical integration with an MVPD. As discussed below, this conclusion is consistent with the application of standard economic principles and norms.

The programming available to an MVPD is best viewed as a continuum running from the most effective to the least effective (per dollar cost to the MVPD) in attracting subscribers. Programming retransmitted from any local broadcast television station has a place in the continuum, but is substitutable with other broadcast and non-broadcast programming of equal effectiveness. In retransmission consent negotiations, the ability of MVPDs to substitute other broadcast and non-broadcast programming constrains the market power of an individual television station.

One indicator of market power would be a television station's or cable network's share of revenues in the sale of their programming rights to a cable operator. Data on such revenues are not available. As a proxy, one can look at the audience share that each station or network has, since audience size should represent at least roughly the relative attractiveness of stations and networks to distributors. For the current television season from September 20, 2004 through February 27, 2005, CBS affiliated stations on average received only about 11 percent of prime time viewing.[7] Such a share is well below the levels at which economists expect to see market power that would produce anticompetitive results.

Broadcasters and cable operators, operating under rules established by the FCC, negotiate retransmission consent agreements that can be complex. Cable operators often choose to provide alternative consideration, such as carriage of cable networks that are affiliated with the broadcaster, in lieu of cash payment. Commenters have suggested that this

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[7] NTI, 20 September 2004 – 27 February 2005. The CBS network has a 14 share of primetime viewing. Due to multi-set use in households, the total primetime share is 125. So, while the CBS network is viewed in 14 percent of households, it only accounts for about 11 percent of all viewing.

practice leads to competitive harm in the programming market, either by significantly increasing concentration in that market or by foreclosing the entry of new programming services.[8] However, this suggestion is unfounded. Even if television stations had considerably more market power than they do, it is unlikely that carriage agreements growing out of retransmission consent negotiations would lead to a significant reduction in competition because there is ample competition in the MVPD programming market and relatively easy entry.

The Commission recently reported that there are 388 satellite-delivered national programming networks.[9] Of these, only 89, or 23 percent, are owned by one or more national broadcast networks. The Commission found that Viacom had an ownership interest in 10 percent of all satellite-delivered national programming networks, ABC/Disney in 5 percent, NBC-Universal in 4 percent and Fox in 3 percent. Each of these shares is far too low to give any broadcast network the incentive to foreclose entry by other video programming providers. Furthermore, it is unlikely that any broadcast network will gain a share that would give it anticompetitive market power.

Research conducted at Economists Incorporated in early 2004 supports these findings. Using data provided by the Commission and other public sources, information was compiled on the ownership and subscriber count for as many as possible of 266 satellite-delivered national programming networks listed in the Commission's Tenth Annual Report.[10] Both basic and premium networks were included. Each network was assigned

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[8] See, for example, JCC at 18-20; EchoStar at 4; and Rogerson at 6-10 and 47-48.

[9] FCC, *Eleventh Annual Report*, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 04-227, Released: February 4, 2005 ("Eleventh Annual Report"), especially ¶¶ 145-8.

[10] FCC, *Tenth Annual Report*, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 03-127, Released: January 28, 2004 ("Tenth Annual Report"), Tables C-1 and C-2.

to a single owner.[11] When added together the companies that own the four major broadcast networks were the attributed owners of 23.7 percent of the 266 networks listed. The HHI based on the number of networks attributed to various owners was 467.[12] See Appendix A. These share numbers are well below levels associated with anticompetitive market power, and an HHI in this range is considered unconcentrated.[13]

Economists Incorporated conducted a second analysis on the 205 networks for which subscriber data were available. When the networks each owner has were weighted by the subscriber count of each network, Viacom's share was 16.9 percent, well below levels associated with anticompetitive market power. Together, the owners of the four major broadcast networks accounted for 33.7 percent. The HHI was 730, well within the range considered unconcentrated. See Appendix A.

Revenue shares are another way to measure the competitive significance of broadcast networks in the market for MVPD programming. Table 2 of Professor Rogerson's paper presents shares of revenues that various ownership groups derive from basic cable networks. Assuming his figures are correct, Viacom's share of revenues is 17.7 percent, and overall concentration, as measured by an HHI, is 1,233.[14] This is consistent with the revenue-weighted results reported in Appendix A. That analysis of 2003 data concluded that the HHI was 1,195 for basic cable network revenue. HHIs in this range are

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[11] Usually, the attributed owner had a majority ownership. In some cases, two owners each had a 50 percent share; in such cases, ownership was attributed to the owner with the larger number of other networks, so as to tilt the calculation towards showing higher concentration. When no ownership information could be determined, and when no owner had above 49 percent, a network was assumed to be owned independently.

[12] The Herfindahl-Hirschman Index ("HHI") is calculated as the sum of the squares of the shares of individual participants. The HHI can range between 10,000 and a number near zero.

[13] See, U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, Revised April 8, 1997, Section 1.51. The spectrum of market concentration as measured by the HHI is divided into three regions that can be broadly characterized as unconcentrated (HHI below 1000), moderately concentrated (HHI between 1000 and 1800), and highly concentrated (HHI above 1800).

[14] For purposes of calculating an HHI, it was assumed that the 13.3 percent of revenue attributed to "others" in Professor Rogerson's table was owned by 13 firms each having an equal share of about 1 percent of revenue.

considered to be moderately concentrated. No owner, including Viacom, has a share that approaches the levels associated with anticompetitive market power.

The Commission also reported an increase of 49 satellite delivered national programming networks in 2004 relative to 2003.[15] Comparing the Commission's listing of national video programming services in 2003 and 2004, we identified only three new services that were owned by one of the four major broadcast networks: ESPN Desportes (owned by Disney and Hearst); History Channel en Español (owned by Disney, NBC, and Hearst); and The Movie Channel HD (owned by Viacom).[16] Furthermore, the Commission found that there were 78 programming services that have been planned but are not yet operational, an increase of 17 over last year.[17] We identified only 6 of these services as being affiliated with one of the four major broadcast networks. This is evidence that carriage agreements that result from retransmission consent negotiations have not foreclosed entry into cable programming.

III. Retransmission Consent and Cable Rates

Commenters have argued that retransmission consent by the four major broadcast networks has been a major cause of cable rate increases. This argument rests on three unsubstantiated propositions: first, that the increase in the number of networks carried by cable operators is driven largely by retransmission consent, second, that increases in cable rates are due principally to retransmission consent-driven increases in the number of networks carried by cable operators, and third, that broadcasters are able to use retransmission consent to leverage increases in license fees for other broadcast-affiliated cable networks.

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[15] Eleventh Annual Report, ¶ 145.

[16] Eleventh Annual Report, Tables C-1 and C-2, and Tenth Annual Report, Tables C-1 and C-2.

[17] Eleventh Annual Report, ¶ 152 and Table C-5.

As detailed by the Commission, there has been substantial growth in the number of cable networks available, the vast majority of which are not affiliated with the four major broadcast networks.[18] Not only has retransmission consent not had a significant, demonstrated effect on the increase in the number of channels carried, it has not led the broadcast networks to account for a "disproportionate share of new channels" that have been added.[19] Kagan's *Economics of Basic Cable Networks* (2005) lists 120 basic cable networks. Of these, 31 are listed as having launched prior to 1993 and 89 as having launched since 1992. Of the 89 networks that launched since 1992, 39 networks, or 44 percent, are listed as currently affiliated with one of the four major broadcast networks. Note that they may not have been affiliated with a broadcast network when launched. By comparison, 16 out of 31, or 52 percent, of the networks that were launched prior to 1993 are listed as currently affiliated with one of the four major broadcast networks.

Commenters' second claim, that increases in the cable rates are due principally to retransmission consent-driven increases in the number of channels carried by cable operators, also appears to be unsubstantiated. There is evidence that the increase in cable rates has far outstripped the increase in cable network license fees. In its recent report on cable industry prices, the Commission found that between January 1, 2003 and January 1, 2004, the average rate for basic and expanded basic service increased by $2.09 per subscriber per month.[20] The Commission also found that programming expenses for basic and expanded basic cable television service increased by only $1.06 per subscriber per month.[21] Hence, the Commission found that only about half of the cable rate increase

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[18] The Commission reported that the number of national, non-broadcast networks increased from 106 in 1994 to 388 in 2004. See, Eleventh Annual Report, ¶ 15.

[19] JCC, p. 5.

[20] FCC, *Report on Cable Industry Prices*, In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, MM Docket No. 92-266, Released: February 4, 2005 ("Report on Cable Industry Prices"), ¶ 25.

[21] Report on Cable Industry Prices, ¶ 32.

from 2003 to 2004 was needed to cover the increase in programming expenses. Similarly, a study by Professor Rogerson found that only 42 percent of the increase in basic and expanded basic cable rates between 1999 and 2002 was necessary to cover the increased cost of programming.[22] The GAO also found that in addition to programming costs, the cable industry has incurred other increased costs, including expenditures to upgrade its infrastructure and expenditures to improve customer service.[23]

Since the increase in total license fee expenses accounts for only a fraction of the increase in cable rates, it is hard to see how new channels added due to retransmission consent have driven cable rate increases. Moreover, new channels allegedly carried due to retransmission consent account for only a small portion of the increase in programming costs. Professor Rogerson presents a table listing 27 cable program networks allegedly carried because of retransmission consent as reported by the ACA.[24] This list probably exaggerates the significance of retransmission consent, since it is likely that some or most of these networks would be carried anyway. While neither confirming nor validating this list, we adopt it for purposes of examining whether cable networks carried as a result of retransmission consent drive cable rates. License fee information for 25 of the 27 networks is available from Kagan's *Economics of Basic Cable Networks* (2005).[25] To determine the impact of carrying these networks on the license fee cost for the average subscriber, a weighted sum of these license fees was calculated with each network's weight equal to the percentage of total multichannel subscribers that received the network. The sum of the license fees for those networks identified as being carried because of retransmission consent in 2004 was $3.67. In 1997, the license fees for these

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[22] Rogerson, p. 18. Another study done by Cap Analysis reported that increased programming costs accounted for only 22 percent of the increase in expenditures by cable operators between 1999 and 2002. CapAnalysis, Rising Cable TV Rates: Are programming Costs the Villian?, October 23, 2003, p. 12.

[23] GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* October 2003 ("GAO Report"), pp. 25-26.

[24] Rogerson, Table 9.

[25] Kagan does not list any information for Fuel or Shop NBC.

networks totaled $1.11. Note that about half of these networks did not exist in 1997. The increase in license fees for these networks from 1997 to 2004 was $2.56. By comparison, the increase in cable rates during the same period was $14.98.[26] In other words, the increase in the average license fee paid per subscriber attributable to these 25 networks was only 17 percent of the increase in cable rates. The increase due to the nine listed Viacom-owned networks is only $0.18. Even accepting the ACA's list, license fees of networks carried because of retransmission consent cannot be fairly described as a major factor driving the increase in cable rates. Moreover, if cable operators were not carrying the broadcast-affiliated cable networks that commenters blame for recent cable rate increases, the operators would be carrying, and paying license fees for, other program services.

Commenters' third claim is that the four major broadcast networks use retransmission consent in order to obtain carriage of affiliated cable channels at higher rates and on more favorable terms than would otherwise have been the case.[27] While the commenters provide no support for this statement, a recent GAO study did examine these issues. To quote GAO's findings:

> Some concerns exist that ownership affiliations might indirectly influence cable rates. Broadcasters and cable operators own many cable networks. GAO found that cable networks affiliated with these companies are more likely to be carried by cable operators than nonaffiliated networks. However, cable networks affiliated with broadcasters or cable operators do not receive higher license fees, which are payments from cable operators, than nonaffiliated networks.[28]

[26] Report on Cable Industry Prices, Attachment 4.

[27] JCC, p. 11.

[28] GAO Report, Highlights of GAO-04-8.

Hence, contrary to commenters' allegations, GAO found "that ownership affiliations—with broadcasters or with cable operators—had no influence on cable networks' license fees."[29]

IV. Effects of Retransmission Consent on Broadcast Programming

Economic theory predicts that granting television stations the opportunity to be compensated for retransmission consent should increase the incentives to provide attractive programming. Stations' choices about the type and quality of programming to carry (including the network affiliation decision) are made to maximize their profits. Stations derive the majority of their revenues from the sale of advertising. Compensation for retransmission consent gives stations an additional way to contribute to their profits. As with advertising revenue, the stations' benefits from retransmission consent will tend to increase with the appeal of its programming, holding other factors constant. Retransmission consent thus increases the total return that a station can expect from its programming, and tends to increase the expenditure level on programming that the station will choose.

The increased incentives for quality programming can be manifest in improved quality of the local programming that stations produce, as well as the syndicated programming that they acquire. Networks providing programming to their affiliated stations can also respond to the change in stations' incentives and provide higher quality programming. Networks also have a direct incentive to do so through the effect that improved network programming has on the compensation that their owned and operated stations receive for retransmission consent.

Professor Rogerson concludes there is no convincing evidence that the quality of network programming has improved as a result of retransmission consent. One response is to note that, to the extent that the effect of retransmission consent is manifest in the quality of

[29] GAO Report, p. 29.

local and syndicated programming, his attempt to measure network programming quality misses the mark. A second response is that several of his measures of network programming quality are flawed or misleading.

Professor Rogerson believes that there is a relationship between revenues and programming expenditures. He argues that since the broadcast networks can command higher advertising rates than cable networks, broadcast networks will be better able to acquire programming.[30] It seems odd to believe that broadcast networks' increased advertising revenue would improve their ability to acquire programming but that revenue gains through retransmission consent would not.

Professor Rogerson's Table 11 compares the growth in programming expenditures by broadcast networks and cable networks. While he points out that the overall share of programming expenditures devoted to broadcast programming has been falling, he fails to control for the fact that the number of national video programming services more than tripled during the time period he examines.[31]

Additionally, Professor Rogerson's analysis does not consider any increases in local station programming expenditures. The vast majority of broadcast television stations are not owned by one of the four major networks, so any retransmission consent payments or compensation made to those television stations would be expected to have the most direct effect on local and syndicated programming expenditures, not network programming expenditures.

Professor Rogerson argues that the quality of broadcast programming has not increased since retransmission consent was enacted. He bases his conclusion on two analyses. In his first analysis, presented in Table 12, he shows that "unscripted" programming hours have increased and that movie hours have decreased on the four major broadcast

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[30] Rogerson, p. 31.

[31] NCTA, *Cable Television Developments 2004*, p. 19, and Eleventh Annual Report, ¶ 15.

networks during prime time from 1992 to 2004. Of course, movies are widely available through other programming sources and rentals, so they haven't disappeared. Professor Rogerson apparently is making a value judgment, on behalf of himself and Congress, that movies are higher quality programming than "unscripted" programming. Over the same time period there was also an increase in the number of prime time newsmagazine hours. Professor Rogerson does not indicate whether he views this as an increase or decrease in quality.

Professor Rogerson's second analysis of broadcast programming quality is presented in Table 13, where he reports the number of prime time Emmys won by the broadcast networks and cable networks for various years from 1992 to 2003. Since the number of Emmys going to broadcast networks has fallen relative to the number going to cable networks, he concludes that the quality of broadcast programming has not increased. Professor Rogerson seems to be ignoring the possibility that while the programming quality of the broadcast networks increased so has the quality of the cable networks, especially the premium cable networks.

Appendix A

Concentration and Viacom Share of Non-Broadcast Programming

On January 28, 2004, the Commission released its Tenth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming.[32] In that report, the Commission indicated that it had identified 339 satellite-delivered national programming networks. (¶¶ 141-2). Tables C-1 and C-2 in that report provide information on 266 national networks. In early 2004, Economists Incorporated undertook an analysis of the ownership of these 266 networks. The Commission's Tables C-1 and C-2 supply a launch date for each of these networks and complete or partial ownership information for many networks. Information from public sources including books, websites and trade press articles was used to fill out missing ownership information and add subscriber levels to the extent possible.[33]

Concentration of non-broadcast network ownership and Viacom's share of non-broadcast networks were measured in three ways: (1) weighting networks equally; (2) weighting each network by its number of subscribers; and (3) weighting each network by its revenue.

Weighting networks equally

In this analysis, each network was counted equally with every other network, and no distinction was made based on the popularity or value of a network. This approach makes use of information for all 266 national networks listed in the Tenth Annual Report. Each network was attributed to a single owner. Most often the attributed owner had a majority

[32] Tenth Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 03-127, Released: January 28, 2004.

[33] With the large number of networks, the need to rely on public sources, and changes in ownership, it is difficult to guarantee 100 percent accuracy. We are unaware of any inaccuracies, but if there are any we believe they would not materially change the statistical conclusions presented here.

ownership in the network. In some cases, one owner was chosen from two owners with 50 percent shares. In such cases, ownership was attributed to the owner with the larger number of other networks.[34] Networks for which no ownership information could be determined, and networks with no owner above 49 percent, were assumed to be owned independently. Under these assumptions, the HHI based on the number of networks attributed to various owners was 467.[35] Viacom is the attributed owner for 36 of the 266 national networks, giving it a share of about 14 percent.

Weighting networks by subscribers

This analysis weights each network by its number of subscribers. Subscriber information could be found for only 205 of the 266 networks, and the analysis is limited to those 205. As in the preceding analysis, each network was attributed to a single owner. The resulting HHI is 730, and Viacom's share of subscribers among this group of networks is 17 percent.

Weighting networks by revenue

The third analysis is based on weighting each network by its revenues. Paul Kagan Associates has estimated 2003 revenue information for nine owners of non-broadcast basic network programming.[36] According to Kagan's estimates, these nine owners account for approximately 85 percent of total revenues of non-broadcast basic networks.[37] Computing shares based on revenues results in an HHI of 1,195.[38] Viacom's share of basic cable network revenue was measured at 17 percent.

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[34] The effect of this is to tilt the calculation towards showing higher concentration.

[35] The Herfindahl-Hirschman Index (HHI) is calculated as the sum of the squares of the shares of individual participants. The HHI can range between 10,000 and a number near zero.

[36] "The New Basic Cable Network Landscape--Basic Cable Attributable Revenue by Owner," Cable Program Investor (CPI) No. 70-3, September 12, 2003.

[37] Total estimated 2003 revenue from "Cable Network Buyers Pensive? Basic Cable Networks Economics Snapshot; Broadcast vs. Cable National Ad Revenue; Basic Cable Network Economics, 1983-2013," Cable

The HHI levels under these three measures range from a low of 467 to a high of 1,195. For two of the measures the HHI is below 1,000, a level considered unconcentrated. The highest of these measures puts concentration in what the Department of Justice and Federal Trade Commission consider to be the "moderately concentrated" range. Under these three measures, Viacom's share ranges from 14 to 17 percent, a range that is well below levels associated with anticompetitive market power.

Program Investor (CPI) No. 70-6, September 12, 2003. In Kagan's estimates, revenue was assigned to owners according to their share of the networks involved, rather than assigning all revenue to a single majority owner.

[38] In the absence of revenue shares for owners outside the nine estimated by Kagan, the HHI calculation assumed that the remaining revenue was owned by firms each having 1 percent of revenue.